



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

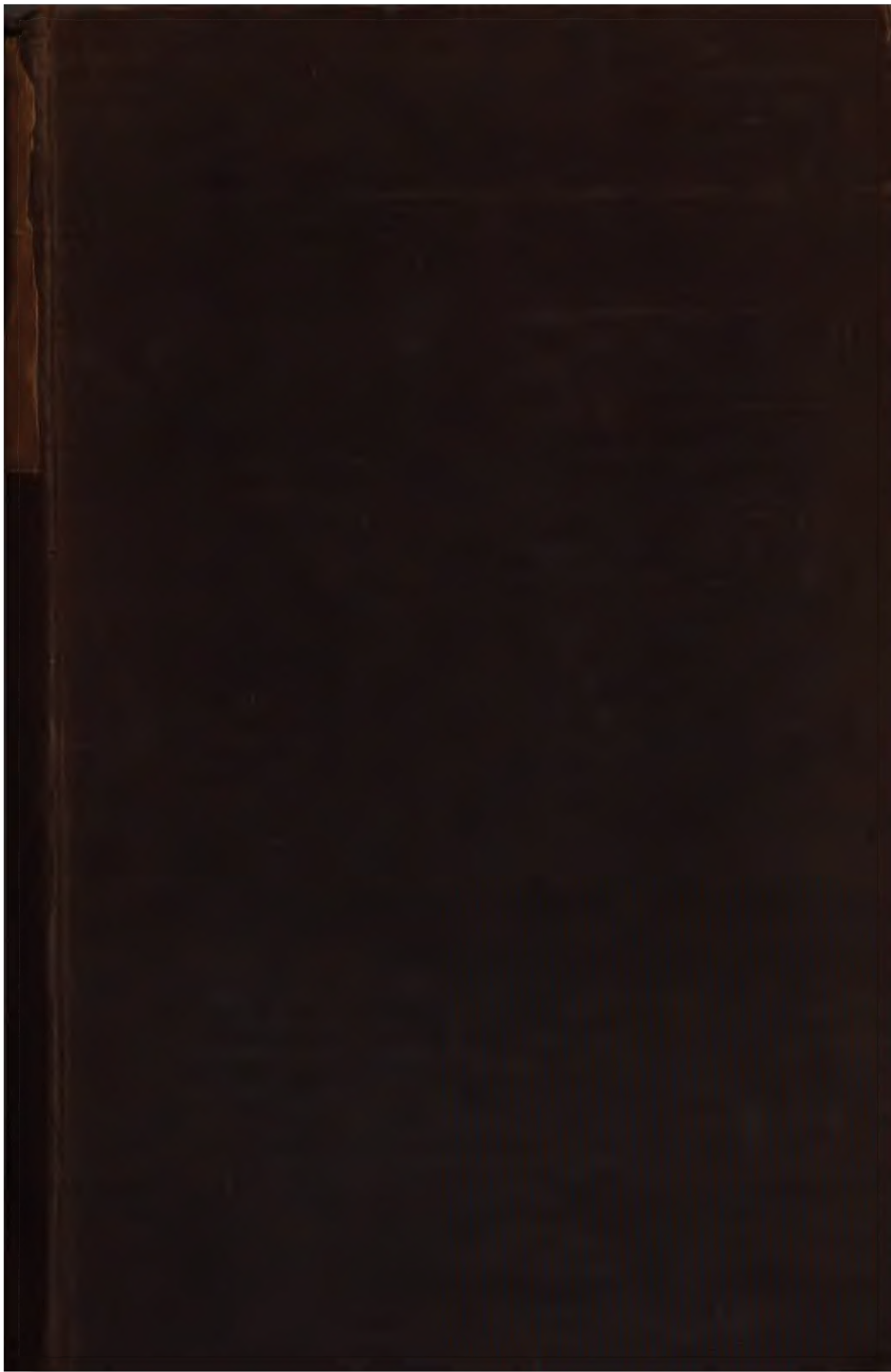
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L. Scot. C. 17 d. 1

L. L

CW. Scotl.

510

R 524 b



LEADING CASES .
IN THE
LAW OF SCOTLAND.

LAND RIGHTS.

"IT MAY BE SAID THAT ALL THIS IS A MERE SUBTILTY, UNDESERVING OF REGARD; AND THAT THE SUPPOSED ANOMALY OF THE CONTRARY VIEW IS ONE BUT IN THEORY, FROM WHICH NO PRACTICAL INFERENCE OUGHT TO BE DRAWN. IT IS SUFFICIENT TO ANSWER, THAT THIS IS A QUESTION OF TITLE, OF WHICH THE WHOLE FORM AND STRUCTURE IS BUILT UPON THEORY. WHAT IS THE WHOLE DOCTRINE OF OUR REAL RIGHTS, AS COMPLETED BY CONSTRUCTIVE AND SYMBOLICAL DELIVERY, BUT A COMBINATION OF SUBTILITIES? BUT THEY ARE SUBTILITIES IN WHICH THE STRICT ADHERENCE TO THEORY IS INDISPENSABLE, FOR THE BEST OF ALL PRACTICAL REASONS, THAT THE THEORY AFFORDS THE ONLY MEANS OF SOLVING WITH CERTAINTY AND CONSISTENCY THOSE NUMEROUS QUESTIONS WHICH WOULD OTHERWISE BECOME THE SUBJECT OF LOOSE AND ARBITRARY ADJUDICATION. IT IS THE THEORY, AND THAT THEORY RIGIDLY ADHERED TO, WHICH IN THIS, AS IN MANY OTHER DEPARTMENTS OF LAW, UNITES THE UNDIGESTED SERIES OF SEPARATE CASES INTO ONE CONSISTENT SYSTEM OF JURISPRUDENCE."

LORD FULLERTON.

LEADING CASES
IN THE
LAW OF SCOTLAND

PREPARED FROM THE ORIGINAL PLEADINGS, ARRANGED IN
SYSTEMATIC ORDER, AND ELUCIDATED BY OPINIONS
OF THE COURT NEVER BEFORE PUBLISHED.

BY
GEORGE ROSS, ADVOCATE.



LAND RIGHTS.

EDINBURGH:
SUTHERLAND AND KNOX, GEORGE STREET.
LONDON: SIMPKIN, MARSHALL, AND CO.
MDCCCXLIX.

EDINBURGH : T. CONSTABLE, PRINTER TO HER MAJESTY.

P R E F A C E.

THE want of a Work similar in its general character to the present has been felt by many, in their earlier studies of the law. Mere abstract propositions of law do not satisfy the student. He wishes to see the principles contained in these propositions applied to actual cases, and he wishes also to see the grounds on which these principles were adopted and came to form a part of the law. The multitude of cases, however, to which he is referred in support of any single proposition, forms a serious obstacle to the student's progress. He has neither time nor inclination to overtake an examination of them all, and he is at a loss to determine which he ought to select. A series of selected Cases, therefore, establishing and illustrating some of the most important principles of the law, and arranged under appropriate heads, may tend, it is thought, to facilitate the labours of the student.

To the Lawyer, too, the Conveyancer and the Practitioner, the present Work may not be without advantage. Those principles which the student is desirous to learn, they are continually called upon to apply in practice, and it is a ready application of them in practice that forms an indispensable condition of professional success. With them, economy of time is of material moment ; and in the hurry of business, a glance at the argument employed in some important Case, and a consideration of the grounds on which the judgment proceeded, may serve to recall or suggest materials for argument applicable to the subject

in which they are engaged. To accomplish these results is the object of the present Work.

The plan and arrangement of the Work was a matter not unattended with difficulty. It is hoped, however, that the attempt to make the Cases assume, as much as possible, the form of a connected series has not been altogether unsuccessful.

The Cases are not taken from previous Reports, except in three instances, where from the antiquity of their date the Session Papers did not exist. The rest have been prepared from the Original Pleadings themselves, and the importance of many of them has been enhanced by Opinions of the Court, obtained from the Manuscript Notes, which are to be found in the various collections of Session Papers preserved in the Advocates' Library. In one or two cases, also, access was applied for, and most readily granted, to the Note-Book of Lord President Blair, and to that also of Lord President Boyle.

Some of the Cases now given appear for the first time, although their names are not unknown to the profession; and others are given at length, of which slight notices only formerly existed. In the Notes which follow the principal Cases, a variety of additional Cases will be found bearing on the proposition under which they are placed.

The farther prosecution of the Work will, in some measure, depend on the desire which may be evinced for its continuance. The undertaking is too laborious to be continued, unless in the belief that its utility is such as to be considered beyond question. In the event of it being continued, the succeeding portion will embrace the Titles,—Feudal Investiture, Renewal of Investiture, Transmission of Personal Rights to Land, Accretion, Personal and Real, Prescription, Double Titles, and Consolidation.

EDINBURGH, *November*, 1849.

CONTENTS.

TRANSMISSION OF LAND.

SECTION I.

FORM OF CONVEYANCE.

	PAGE
Simpson v. Barclay and Gemmil, January 10, 1752, . . .	1
Montgomery v. Innes and Foulis, June 10, 1795, . . .	7
Duke of Hamilton v. Douglas, April 13, 1764, . . .	10
Ogilvie v. Mercer,	13
Hamilton v. Bogle, February 28, 1819,	22
Buchan v. Cockburn, July 14, 1739,	33
Shanks v. Kirk-Session of Ceres, January 27, 1797, . . .	42
Graham v. Don, December 15, 1814,	50
Horne v. Breadalbane's Trustees, February 21, 1842, . . .	55
Sinclair v. Breadalbane, August 14, 1846,	70
Brough v. Glover, December 7, 1810,	98

SECTION II.

SOLEMNITIES OF CONVEYANCE.

Earl of Dalkeith v. Book, February 13, 1728,	105
--	-----

SECTION III.

OBLIGATION TO CONVEY.

Cunninghame v. Lady Semple, July 5, 1706,	110
Govan v. Boyd, December 10, 1790,	112

SECTION IV.

ADJUDICATION IN IMPLEMENT.

	PAGE
Sinclair v. Sinclair, June 21, 1704,	119
Campbell v. M'Vicar, July 23, 1752,	121

SECTION V.

ADJUDICATION FOR DEBT.

Mackenzie v. Ross and Ogilvie, June 1, 1791,	133
Grindlay v. Drysdale, July 4, 1833,	140
Anderson v. Nasmyth, March 3, 1758,	152
Campbell v. Scotland, March 7, 1794,	155
Stewart v. Lindsay, November 26, 1811,	164
Landale v. Carmichael, November 25, 1794,	174
Paul v. Reid, February 8, 1814,	182
Paton v. Drysdale, July 20, 1725,	194
Ainslie v. Watson, July 25, 1738,	196
Gedd v. Baker, December 5, 1740,	200
Cutler v. M'Lellan, December 9, 1762,	204
Spence v. Bruce, January 21, 1807,	206
Robertson v. Duke of Athole, May 10, 1815,	208
Barclay v. Creditors of Crimonmogat, June 23, 1720,	222
Stirling v. The Annualrenters of Ballagan, February 26, 1724,	226
Wallace v. Barclay, December 8, 1736,	228
Duchess of Douglas v. Scott, July 26, 1764,	233
Binning v. Auchinbreck, December 5, 1747,	248
Chalmers v. Cunningham, November 8, 1787,	253
Miln v. Creditors of Nicolson, February 15, 1698,	259
Cockburn's Creditors v. Langton, January 20, 1709,	266
Campbell v. Drummond, March 8, 1730,	270
Lithgow v. Whitehaugh, January 10, 1747,	276
Cockburn's Creditors v. Langton, January 8, 1760,	281

SECTION VI.

ADJUDICATION IN SECURITY.

Nisbet v. Stirling, February 16, 1759,	287
Dunlop's Creditors v. Brown and Collinson, November 14, 1781,	290
Duke of Queensberry's Executors v. Craufurd Tait, July 11, 1817,	294
M'Niel's Creditors v. Saddler, March 7, 1794,	296

CONTENTS.

ix

SECTION VII.

ADJUDICATION CONTRA HÆREDITATEM JACENTEM.

	PAGE
Stewart v. Lindsay, December 7, 1809,	304
Corser v. Durie, December 19, 1638,	314

SECTION VIII.

DECLARATORY ADJUDICATION.

Menzies v. Menzies, July 12, 1736,	320
Dalziel v. Henderson and Dalziel, March 11, 1756,	324
Drummond v. M'Kenzie, June 30, 1758,	327

SECTION IX.

DECREE OF SALE.

Rollo v. Dundas, November 9, 1739,	335
Urquhart v. Officers of State, February 6, 1757,	340

SECTION X.

TRUST ADJUDICATION.

Hepburn v. Scott, July 25, 1781,	348
Craigie v. Ker, January 19, 1808,	353
Dunlop v. Cochrane, March 31, 1824,	362
Gordon v. Ogilvie, February 17, 1761,	366
Rutherford v. Nisbetts' Trustees, November 27, 1832,	373

SECTION XI.

TRUST DISPOSITION.

Willoch v. Auchterlony, March 30, 1772,	401
Ker v. Ker's Trustees, February 24, 1829,	404
Cameron v. Dick's Trustees, August 29, 1833,	406
Dundas v. Lewis, May 13, 1807,	415
Inglis v. Harper, October 18, 1831,	417
Kers v. Wauchope, February 21, 1812,	432
Ker to Ker's Trustees, October 1, 1831,	439

	PAGE
Rose v. Fraser, January 26, 1790,	449
Campbell v. Edderline, July 14, 1801,	458
M'Millan v. Campbell, June 28, 1832,	466
Giles v. Lindsay, February 27, 1844,	479
Gordon's Trustees v. Harper, December 4, 1821,	499
Russell v. Macdowal and Selkrig, February 6, 1823,	505
Paul v. Boyd's Trustees, May 22, 1835,	511
Grierson v. Ramsay, February 25, 1780,	516
Wilson v. Smart, May 31, 1809,	519
Durie v. Coutts, November 30, 1791,	524
Angus v. Angus, December 6, 1825,	529
Burrell v. Burrell, December 14, 1825,	535
Cave's Creditors v. Murray, January 21, 1736,	553
Hawkins v. Hawkins, May 23, 1843,	555

SECTION XII.

NOMINATION OF HEIRS.

Kennedy v. Arbuthnot, July 13, 1722,	566
Stewart v. Porterfield, September 23, 1831,	569

SECTION XIII.

REVOCATION OF SETTLEMENTS.

Henderson v. Wilson and Melvilles, March 29, 1802,	594
Crawfurd v. Coutts, March 14, 1806,	617
Moir v. Mudie, March 1, 1824,	646
Rowan v. Alexander, November 12, 1775,	653
Roxburghe v. Wauchope, May 25, 1820,	659
Dundas v. Dundas, May 21, 1783,	667
Lang v. Whytlaw, February 20, 1810,	674
Leith v. Leith, June 6, 1848,	691
 INDEX OF CASES,	 731
 INDEX OF MATTERS,	 736

TRANSMISSION OF LAND.

SECTION I.—FORM OF CONVEYANCE.

LEADING CASES

IN THE

LAW OF SCOTLAND.

Land cannot be conveyed by Testament, or by any Deed not expressing a present act of alienation, and no expression of intention to convey, however clear, will afford ground of action against the heir of the Testator to denude.

I.—SIMPSON v. BARCLAY AND GEMMIL.

IN February 1722, William Barclay conveyed his estate of Warrix to his only son, Robert Barclay, his heirs and assignees. In June of the same year, Robert Barclay executed a tailzie of the estate in favour of himself, and the heirs-male of his body ; whom failing, to his father, William Barclay, and the heirs-male of his body ; whom failing, to his uncle, Alexander Barclay, and the heirs-male of his body. The deed contained a power of revocation.

January 10,
1752.

NARRATIVE.

Robert Barclay afterwards went to South America, and, while resident at Buenos Ayres, he executed a testament in these terms :—" I give and bequeath to my father all the yearly interest of my estate, whether in money, goods, lands, or whatsoever else pertains to me at the time of my death, either in England, Scotland, or any parts of Europe or America, for his whole use and behoof, and during his natural life. And after his death I give and bequeath the above-mentioned monies, goods, lands, &c., to my sister, Jean Barclay, for her sole use and behoof, during her natural life, and afterwards to her heirs for ever."

SIMPSON
v.
BARCLAY and
GEMMIL.
1752.

After bequeathing various legacies, the deed proceeded thus :

" I give and bequeath unto my foresaid sister, Jean Barclay, all the rest and residue of my estate, of what kind or species whatsoever, either in these parts, or in any other place or places of England, Scotland, or elsewhere, after my afore-mentioned father William Barclay's death, for her sole use and behoof, and to her heirs for ever."

A clause of revocation was in these terms :—" And lastly, I do hereby revoke, annul, and make void, all former wills, codicils, or bequests made by me, and do declare this only to be, and remain for, and as my last will and testament, dated in Buenos Ayres in America, the thirty-first day of May, in the year of our Lord one thousand seven hundred and thirty-four, new style. *Robert Barclay*.—Signed, sealed, published, and declared by the testator, for and as his last will and testament, in presence of us, who witnesseth to the same. *Edward Eyles, Jo. Graham, Thomas Sedden*."

Annexed to the deed was the following declaration :—" I hereby declare, that the disposition which I have granted in favour of my sister, Jean Barclay, was made with the real intent that the said Jean Barclay, after my father's and my death, no lawful heirs of my body surviving, might take quiet possession, for her own use and her heirs, of all lands, houses, tenements, sum or sums of money, and all other effects whatsoever belonging to me at my death ; and as I had no lawyer here to apply to for advice, and to draw such a disposition as might be more valid, to secure to my said sister all lands, sums of money, or other effects belonging to me at my death, I thought proper to annex this, that my design and intention, by foresaid disposition, might not be frustrated or inverted by any mistake or ignorance in the writing.—*Buenos Ayres*, the twenty-ninth of May, one thousand seven hundred and thirty-four years, before these witnesses, ROBERT BARCLAY.—*Edward Eyles, Robert Young, Jo. Graham*."

It was alleged that the declaration was of the same date with the testament—the former being dated according to the old style, and the latter according to the new.

Robert Barclay died without issue, but leaving two sisters, Jean and Barbara. Jean was married to a Mr. Gemmil, who

brought an action of declarator in his wife's name, and thereafter in that of her infant son, Robert Barclay Gemmil, against Alexander Barclay, the heir under the tailzie executed by Robert Barclay in June 1722.

SIMPSON
v.
BARCLAY and
GEMMIL.
1752.

In this process, the Earl of Leven, Lord Ordinary, found and declared, "That the disposition and tailzie in favour of the said Alexander Barclay was revoked by the disposition granted by Robert Barclay to his sister; and repelled the objection to the said disposition, that the same is by way of testament in respect of the will and meaning of the granter, manifestly expressed, and of his circumstances at the time."

Against this interlocutor a petition was presented to the Court, which was ordered to be answered. This produced a submission between Alexander Barclay and the father of Robert Barclay Gemmil, as administrator for and taking burden upon him for his son; and the arbiters, in 1740, adjudged certain parts of the estate to Alexander Barclay, and the remainder to Zacharias Gemmil, for behoof of his son.

The present action of reduction and declarator was raised by Janet Simpson, only child of Barbara Barclay, the second sister of Robert Barclay; and the defenders called were Robert Barclay, the son and heir of Alexander Barclay, who had right under the tailzie of June 1722, and Robert Gemmil, the son of Jean Barclay, the other sister of the testator.

PLEADED FOR THE PURSUER.—The disposition or bond of tailzie, executed by Robert Barclay in June 1722, in favour of Alexander Barclay, was revoked by the testament executed at Buenos Ayres in 1734. The cause which hinders heritage from being conveyed by testament is the personal privilege of heirs not to be prejudiced by a death-bed deed, joined with the *presumptio juris et de jure*, that every testament is of the date of the testator's last moments. But Robert Barclay might have scored his subscription to the tailzie, put it in the fire, or left an order in writing to cancel it; and he might have done any of these acts in his last moments. Any of these acts would have been effectual to put an end to the tailzie, notwithstanding he was on his death-bed; so also he was entitled to declare his will to have it revoked in his

ARGUMENT FOR
PURSUER.

SIMPSON
v.
BARCLAY and
GEMMILL.
1752.

testament, which *presumptione juris* is a death-bed deed, and that because his revocation was not in prejudice, but in favour of his heir.

Though the testament was sufficient to revoke the tailzie, it was insufficient to convey heritage, for no testament or deed of a testamentary character can convey heritage. A testament is the last will of the defunct, and is in law construed to be the deed of his last moments, just as much as if it bore that date. It is therefore of no import that a person has expressed his intention fully and distinctly in his last will, how his heritage should go ; because, by the law of death-bed, he is disabled from prejudging his heir by any death-bed deed, which a testament *presumptione juris et de jure* is held to be. Upon this solid principle is built the maxim that heritage cannot be transmitted by testament.

The declaration subjoined to the testament cannot afford ground of action against the heirs of the testator to make the will effectual, on the ground that it is a sufficient declaration of Robert Barclay's will. The testament is as full an indication of the will of Robert Barclay, that his estate should descend to the heirs therein mentioned as the declaration is, yet the testament is not effectual to convey heritage. The declaration, like the testament, does not in the least participate of the nature of a deed, *inter vivos*, but may be called *more last words of the testator*. The words of the declaration are not devised to give or bequeath anything. Of themselves, therefore, they can have no effect. They are adjected by the testator as a key to the testament, or an explanation of what he meant by the testament ; but nothing new is intended to be done. As the testament, therefore, is ineffectual to convey the heritage, the declaration being only a commentary upon, key to, or explanation of the testament, cannot subsist by itself, or be effectual to convey anything, but must necessarily fall with the testament. The intention of Robert Barclay is no doubt abundantly clear, but it would be striking at the first and fundamental principles of law, to give the aid of the law to intention not properly and legally declared.

As, therefore, the tailzie was revoked by the testament, and as the testament is ineffectual to convey heritage, the declara-

tion by Robert Barclay, for explaining the testament, can have no effect as to any question concerning the heritage, and therefore the pursuer, and the defender, Robert Gemmil, are joint-heirs of Robert Barclay.

SIMPSON
v.
BARCLAY and
GEMMIL.
1752.

PLEADED FOR THE DEFENDER.—A testament is not a competent way of revoking a disposition of lands. One by testament cannot burden his land estate with a shilling, and therefore it is incongruous that a testament should have the effect of totally annulling the settlement of a land estate. A testament cannot be effectual to recall or extinguish a feudal right, upon the maxim that *jura eodem modo destituuntur quo constituuntur*, or, as Lord Stair expresses the rule in the civil law, *unumquodque eodem modo dissolvitur quo colligatum est*; and his Lordship applies this to the case of feudal rights, as adopted into our law. It requires the same means to disannul a deed that it does to constitute one. Since, therefore, a testament could not burden a land estate with a legacy to the least extent, it would seem unreasonable that it should have the effect to destroy the whole settlement of such estate.

ARGUMENT FOR
DEFENDER.

The writing subjoined to the testament expressly refers to a disposition by Robert Barclay in favour of Jean Barclay, his sister, and declares that the same was made with a real intent that she should, after his own decease without heirs of his body, take possession of all lands. The declaration was annexed by the testator, that his design and intention might not be frustrated or disappointed. There is here a sufficient ground to establish a conveyance and settlement of the estate. It is rather stronger than the case of *Henderson*, 31st January 1667, where it was found that, though the writ was informal, yet, as the defunct's meaning was to alienate his right from his heir to the pursuer, it was therefore effectual against the heir to complete the same. As, therefore, there can be no doubt of Robert Barclay's intention, the declaration is a sufficient indication of his resolution that his estate should descend to the heirs therein mentioned, and therefore affords action against his heirs-at-law to denude in their favour. The defender, Robert Gemmil, therefore, as heir of Jean Barclay, ought to be preferred to the pursuer.

SIMPSON
v.
BARCLAY AND
GEMMIL.
1752.
Interlocutor of
Lord Elchies,
Feb. 10, 1749.

LORD ELCHIES pronounced the following interlocutor :—
“ Finds the disposition by Robert Barclay, anno 1722, was
revoked by the testament and codicil annexed, executed by the
said Robert Barclay anno 1734 : Finds that the foresaid testa-
ment and codicil is no habile conveyance of the heritage in
question ; and finds that the pursuer and Robert Barclay
Gemmil are joint-heirs by the disposition anno 1722, granted
by William Barclay, the father.”

JUDGMENT.
Dec. 11, 1751.

This interlocutor was altered by the Court, who pronounced
the following interlocutor :—“ On the report of the Lord Elchies,
the Lords find the disposition made by Robert Barclay, in the
year 1722, was revoked by the testament made by him in the
year 1734 ; and find that, though the said testament is not
effectual to convey the heritage, yet the declaration subjoined
to it being a sufficient indication of the will of Robert Barclay,
that his whole estate should descend to the heirs therein men-
tioned, will afford ground of action to the heirs of Jean Barclay
against the pursuer, one of the heirs-portioners of Robert
Barclay, to denude of the said estate ; and remit to theordi-
nary to proceed accordingly.”

To this interlocutor the Court adhered, January 10, 1752.

Elchies' De-
cisions, vol. ii.
p. 486.

Lord Elchies, in his Notes on this case, observes,—“ A tailzie
containing a power of revocation, *etiam in articulo mortis*, was
found effectually revoked by a latter will and testament, exe-
cuted by the maker of the entail at Buenos Ayres, though they
found that that testament was not sufficient to convey the estate
to the legatee. But a declaration having been by him sub-
joined to the will, shewing the *enixa voluntas* that his sister the
legatee and her heirs should enjoy his estate, and therefore
requesting that the above disposition (meaning the will) might
take effect, having no lawyer to advise him better, the Lords
found this writing sufficient to limit the heir, and a sufficient
title for an action to denude, but by the narrowest majority ;
viz., four, besides Milton in the chair, three against it, and
three *non liquet inter quos ego* ; 10th December 1751.—10th
January 1752. The Lords adhered, *me renit*, in the chair—
the Court equally divided, and one *non liquet*.”

Brown's Sup-
plement, vol. v.
p. 794.

Lord Monboddo, in his Reports, observes,—“ The Lords
found, *1mo*, that, by the testament, the tailzie in the year 1722

was revoked; *2do*, they found that the declaration subjoined to this testament was a proper deed of conveyance of the land estate in favour of Jean Barclay, and her heir Robert Barclay, the defender, to the effect of obliging the heir-at-law of the testator to make up titles and denude in favour of the defender. This last point carried with more difficulty; Lord Elchies being of opinion that the first deed being clearly a testament, and the last deed relating to it, and, consequently, not being a separate deed, but only a part of the first, no heritage could be conveyed by it."

SIMPSON
v.
BARCLAY and
GEMMIL.
1752.

On Lord Kilkerran's Session Papers there is written,—“ December 10, 1751,—We were all agreed that the declaration subjoined to the will was a good alteration of the tailzie. As to the question, If the declaration should be sustained to afford action against Robert's heirs to denude, we divided: *Pro*, Minto, Drummore, Shewalton, Leven, and the President Milton. *Con*, Dun, Murkle, Woodhall. *Non Liqueat*, Strichen and Elchies, who reported.—10th January 1752. *Adhered: Con*, J. Clerk, Dun, Murkle, Woodhall. *Pro*, Milton, Minto, Drummore, Shewalton, Leven,—Strichen not clear,—Elchies in the chair, *contra*.”

MS. Notes.
Kilkerran's
Session Papers.

In 1791, the will and codicil,—the original of which had never been produced, but had remained in the Prerogative Court of Canterbury,—were examined on behalf of the son of Janet Simpson, the pursuer of the former action. It was then discovered that the will and the codicil were written on separate sheets of paper, and that the will was written on three pages of one folio sheet of paper, and the codicil upon one page of half a folio sheet, and that they were neither pinned nor tied together.

MONTGOMERY
v.
INNES and
FOULIS.
1796.

It also appeared that neither the will nor the codicil were holograph of Robert Barclay; that the will appeared to be in the handwriting of the witness, Thomas Sedden, and the codicil in that of the witness, Robert Young. On this discovery being made, an action of reduction and declarator was brought by Montgomery, an adjudging creditor of Wilson, the eldest son of Janet Simpson, the pursuer of the former action. The de-

MONTGOMERY
v.
INNES and
FOULIS.
1798.

fenders were James Innes and Alexander Foulis, the disponees of Alexander Barclay and Robert Barclay Gemmil, in the lands respectively awarded to them by the decree-arbitral in 1743. One of the grounds of reduction was, that the will and codicil were neither holograph nor executed according to the form and solemnities of the law of Scotland, and were therefore null writings, and could have no effect as a settlement or conveyance of heritage.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The present ground of challenge is perfectly open and entire. It was never once mentioned in the former action, nor indeed could it be mentioned, as it was founded on facts which were not known at that time, but which have been recently discovered, in consequence of an examination of the original writings in the Prerogative Court of Canterbury, which were never produced in the former action.

In deeds or contracts relating to a man's person or personal estate, which has properly no *situs*, if the writing, which is the evidence of the deed or contract, is formally executed according to the law of the place where it is made, it must be effectual all the world over. Such deeds or contracts the law of Scotland sustains, if executed according to the forms of the place where they are made, whether they are agreeable to its own forms or not. The same rule, it is believed, is observed in most other countries, it being founded on the principles of universal justice and good policy. But with regard to deeds which directly relate to land property, and which cannot possibly receive effect except in the country where the lands are situated, the case is entirely different, and the rule of law differs accordingly. In this case, the courts of the country where the lands are situated must judge solely according to their own law, and will give execution to no deeds except such as come before them authenticated by the forms which these laws require.

Although the will or testament cannot possibly operate as a conveyance or new settlement of the lands, it may nevertheless be effectual to revoke the former tailzie. This was expressly decided in the former case, by the interlocutors both of Lord Elchies and of the Court, and by these interlocutors the tailzie of 1722 was held to be revoked accordingly. In like manner, in

the late case of Sir Thomas Dundas, a will by the judgment of the Court was found effectual to revoke a prior entail ; and although that judgment was reversed upon appeal, it does not appear that the reversal proceeded upon the ground that the will was insufficient in point of form to operate a revocation. There were sundry other points pleaded in that case, and particularly it was argued, upon strong grounds, that no revocation of the entail was intended. Nor would it very materially affect the party from whom the pursuer adjudged, although it were to be found that the will could not operate even as a revocation, because he is now heir under the tailzie executed by Robert Barclay in 1772.

MONTGOMERY
v.
INNES and
FOULIS.
1796.

PLEADED FOR THE DEFENDER.—The judgments, 11th December 1751, and 10th January, 1752, pronounced by the Court after full discussion of the rights of parties in the former action at the instance of Janet Simpson, the mother of William Wilson, in right of whom the present action is brought, are *res judicata*, and cannot now be challenged at the distance of forty years. A judgment pronounced by a competent court, after a full hearing of the proper parties to the cause, must be final and conclusive, and afford the party in whose favour it is pronounced the benefit of the defence, *res hactenus judicata*, unless it can be afterwards set aside upon a fact, *noviter veniens ad notitiam*, or upon instruments *noviter reperta*. But even if the pursuer could really bring forward facts *noviter venientia ad notitiam*, he could not thereupon, after the lapse of forty years, challenge the decree of the Court in an action of reduction *post tantum temporis*. This question, however, it is unnecessary to discuss, because it is impossible to allege that the circumstances on which the pursuer founds in the present action are facts *noviter venientia ad notitiam*. It can scarcely be doubted that they were known at the time the decree was pronounced, though probably they were not considered as material to the issue, and therefore not brought forward. There were exact copies of the deeds, extracted from the Prerogative Court of Canterbury, under the hands of the proper officers, produced in process, containing the testing clause, as well as every other part of the deeds. From them it was seen that there was no designation

ARGUMENT FOR
DEFENDER.

MONTGOMERY
v.
INNES and
FOULIS.
—
1796.

either of the writer or witnesses ; and therefore, if any stress could be laid upon this circumstance, it must be held to have been competent and omitted.

The decree itself was well founded, because the will and declaration were sufficient to carry the granter's intention into execution, at least by means of an adjudication in implement, just as much as if he had made the most formal disposition that an experienced conveyancer could have devised.

JUDGMENT.
June 9, 1795,
and
May 17, 1796.
OPINIONS.
Bell's Folio
Cases, p. 203.

The Court " Assoilzied the Defenders," and on a Reclaiming Petition by the pursuer, they afterwards " Adhered."

LORD BRAXFIELD observed,—“ With regard to the old decision of *Simpson v. Barclay*, I am very clear that it was ill decided. I am for preserving the purity of our conveyances, and I have always endeavoured to preserve it. In this case I can see no distinction betwixt the will and the codicil ; they are both declarations of wills, and no more ; and I hold it to be an inviolable rule of the feudal law of Scotland, that an estate cannot be conveyed by mere expression of will. There must be words *de presenti* conveying the lands. The pursuer, therefore, is well founded on the merits, but he comes too late with the challenge.”

OPINIONS.
MS. Notes.
Sir Ilay Campbell's Session
Papers.

On the Session Papers, LORD PRESIDENT CAMPBELL has written,—“ Settlement in the form of an English will. The decision of the Court in 1751 and 1752, contains two propositions : *First*, That the disposition 1722 was revoked by the testament. *Second*, That the declaration contained in the codicil being an indication of will, is a good ground of action against the heirs to denude. It is thought neither of these propositions are well founded in law.

“ The revocation cannot be taken *per se* disjoined from the intended will or settlement. The decision in the case of *Cunninghame v. Whiteford*, has always been found fault with, and can only be justified by the circumstance of one of the duplicates being cancelled. See case of *Crawford v. Coutts*. Such a revocation is always in its nature conditional, unless the contrary be expressed. See also the case of *Laurence Dundas v. Sir Thomas Dundas*, in House of Lords, 23d May 1783. It is not the purpose of such a clause to let in the heir-at-law, but

merely to substitute one deed for another, and if the last be ineffectual as a settlement, it will not be good as a revocation. The principles laid down in the case of *Rowan v. Alexander*, 22d November 1775, apply equally to the case of an express and of an implied revocation, unless the revocation be in a separate instrument, and clearly denote the intention of the maker to set aside this former deed in all events.

MONTGOMERY
v.
INNES and
FOULIS.
1796.

“As to the point, viz., Whether either the will or the declaration, or both taken together, can be construed into a deed of settlement, or an obligation to settle, the principle upon which the interlocutor is founded, would be a very dangerous one to the law of Scotland, even if these writings were probative, which they are not; for it would throw loose altogether the distinction between latter wills and settlements of heritable succession. See the argument upon this head fully stated in the appeal case for *Mr. Douglass v. Duke of Hamilton*, 29th March, 1779. Indeed, the principle assumed in the case of *Barclay and Simpson* has been departed from in every case of the kind which has since happened, particularly that of *Burgess v. Stainton*, 18th January 1764, which was very similar. It was given up too in the case of *Sir Thomas Dundas*, already mentioned. But, at any rate, the objections which have now been discovered to the validity of the will and declaration, as affecting heritable estate of any kind, are insuperable, for they are neither holograph nor attested according to the solemnities of the Act 1681, and consequently are null and void as deeds affecting heritage.

“As to the case of *Govan and Boyd*, observed by Bell, p. 223, the import of the opinions there given is misunderstood. In that case there was an onerous mutual contract entered into between parties in the English form, which, in so far as binding against third persons, fell clearly to receive execution everywhere, as a personal obligation cannot be annulled or varied by change of place. Thus, if a man should enter into marriage articles in the English form, binding himself to convey his Scots estate for the purposes of marriage, and should afterwards come to Scotland, an action would lie against him there to fulfil the contract by executing proper deeds, and upon the decree of the Court of Session an adjudication in implement might follow, and

MONTGOMERY
 v.
 INNES and
 FOULIS.
 1796.

indeed whether he comes to Scotland or not, a decree of the Court of Session would reach his estate. The same would be the case if being in England he should grant an obligation in the English form to give heritable security in Scotland for a debt. The obligation against his person being valid and binding according to the *lex loci contractus*, is a good ground upon which he may be sued in Scotland in terms of the obligation, being in short a binding obligation all the world over.

“ But a settlement or signification of will stands upon quite a different footing. If it regards moveable succession only, it will be good if executed according to the *lex loci*; but if it regards heritable or immovable succession, it must be according to the *lex rei sitæ*. This does not seem in general to be disputed, but it is said that an informal or an incomplete deed, though insufficient as a direct settlement, may be sustained as an obligation to settle, *e.g.*, a disposition without procuratory or precept is a good foundation, upon which an adjudication in implement may be obtained. The meaning of this is, that a disposition without procuratory and precept cannot of itself vest the *jus in re*, but some legal step must be taken to complete the real or feudal right, and therefore it may be said without impropriety, that such a disposition is of the nature of an obligation, and as such may be made the ground of an action; but then it must be formal and probative, for if it be destitute of the solemnities required by law, it will not carry even a personal right, nor be the foundation of any action for implement. As little can it be converted into a contract or obligation against the party granting it, or against his heirs.

“ A settlement of succession, even when executed according to legal form, is not binding against the granter at all, for he may revoke and alter it at pleasure, or throw it into the fire; but no doubt if he leaves it behind him unaltered, and if it be executed according to legal form, it will bind his heirs, not as a contract entered into with them, or an obligation granted by them, but because it is a good settlement, which, of course, may be enforced against them. It is not because the granter himself was bound by it, for, in fact, he was not bound; but because his heirs cannot take up his succession without fulfilling his intentions with regard to that succession, if these intentions are

signified by a formal and probative deed fit for the purpose of devising the succession.

“In the present case we have neither contract, obligation, nor settlement, but a mere latter will and an improbative declaration with regard to the granter’s succession, which neither could have bound his person in England, nor can have any effect whatever against his heirs in Scotland. In short, it is not an obligation, and it is not a valid settlement, in any form known by the law of Scotland. To convert this into an obligation against the heirs, would be at once to unhinge every principle of our law with regard to succession. The only ground upon which it was possible to support the last deed, was to hold it as a subsidiary deed, in exercise of a reserved faculty. See the case of *Henderson v. Wilson*, 31st January 1797. But it was not argued upon this footing. The decision, too, of the House of Lords, in the case of Sir Thomas Dundas, is very much against the judgment in this case.

“The result is, that the judgment 1752 was erroneous, and that the deed executed by Robert Barclay in 1722, must be held as the deed which regulated his succession, if we suppose the estate to have been in him at all; but there is some doubt whether it did not remain under the father’s power, or, in other words, whether the father’s disposition in 1722 was ever delivered. But let that matter be as it will, the pursuer, as in right of Barbara Barclay, has no title unless it be under the entail, 15th June 1722, to the succession. The right must either be in the heirs called by the deed 15th June 1722, or in the representatives of Jean Barclay, under the deed 1729, or in both together, in terms of the succession and decreet-arbitral, which took place between them.”

On the Reclaiming Petition for the pursuer, LORD PRESIDENT CAMPBELL has again written,—“It is pretty well made out in this paper, that the deed 19th February 1722, was a delivered evident. The present action, too, was raised in May 1791, within forty years of the last judgment of the Court, in 1752. But in so far as the pursuer maintains the same plea, that his predecessor Janet Simpson did, under the deed in February 1722, and challenges the other deeds either as revoked or as not effectual, he comes too late to set aside a final judgment of

MONTGOMERY
v.
INNES and
FOULIS.
1796.

MS. Notes.
Sir Ilay Camp-
bell’s Session
Papers.

MONTGOMERY
v.
INNES and
FOULIS.
1796.

the Court, after an acquiescence of near forty years, and a pretty strong act of homologation, viz., acceptance of the reversion. This point is waived in the petition, but it would require explanation. It is true, the plea of competent and omitted does not militate against pursuers, and the old process being still in Court unextracted, may be the more easily opened. But any view or different statement of the same plea, which was formerly maintained under the deed 19th February 1722, and against the validity and effect of the other deeds, ought scarcely now to be listened to, whether upon different arguments in law, or upon alleged recent discoveries in fact, these last being only such as appear *ex facie* of the writings themselves, and were as obvious then as they are now. A solemn judgment, however wrong we think it in principle, ought not at such a distance of time to be overhauled, otherwise there would be no end of litigation."

MS. Notes.
Baron Hume's
Session Papers.

On the Session Papers, BARON HUME has written,—“Thought that the judgment, though ill founded, could not be quarrelled *post tantum temporis*. Even right of appeal lost.”

II.—DUKE OF HAMILTON v. DOUGLAS.

March 29, 1779.

NARRATIVE.

In 1744, Archibald Duke of Douglas executed a revocation of his previous settlements in the following words:—“ I, Archibald Duke of Douglas, for certain most just causes me moving, *and to the end that*, on failure of myself and the heirs female of my body, my lands and estate, and heritable offices, and jurisdictions within Scotland, *may descend to and continue with the heirs of the ancient rights and investitures of the same*, by these presents revoke and recall all deeds and settlements made and granted by me of my lands and estate, heritable offices and jurisdictions, in whole or in part, preceding this date, declaring hereby all such deeds and settlements so made by me to be void and null, as if I had never granted the same ; reserving, nevertheless, full power to me, to make new settlements of

my estate, in such manner as I at any time hereafter shall think fit; and I dispense with the not delivering hereof to those having an interest therein."

HAMILTON
v.
DOUGLAS.
1779.

On the death of the Duke in 1760, a competition arose between the then Duke of Hamilton, the brother of the pursuer, and the defender. Among a variety of other points of dispute, the Duke of Hamilton insisted that the deed of revocation 1744, which remained uncanceled and subsisting at the Duke of Douglas's death, was not merely a deed of revocation, but also a deed of settlement of the Duke's succession. The Court found "That the deed of revocation, anno 1744, was no legal or proper settlement of the lands and estate belonging to the late Duke of Douglas."

Dec. 9, 1762.

The Duke of Hamilton reclaimed, but, as other actions were pending between the parties, the advising of the reclaiming petition was delayed. His Grace having died, his brother, the pursuer, succeeded, and mutual actions of declarator and reduction were then instituted between him and the defender. The processes were conjoined, and one of the points insisted in by the pursuer was the validity of the deed of revocation 1744 as a deed of settlement.

PLEADED FOR THE PURSUER.—The deed 1744 is a valid and effectual settlement of the estate. A disposition with procuratory and precept is a perfect deed, which the disponent can complete into a feudal right by virtue of the powers contained in the deed itself. If these are omitted, the deed is equally valid, and in the end equally effectual, only it will be necessary, for carrying it into execution, to have recourse to legal proceedings—such as an action to denude, or an adjudication in implement, against the heir of the investiture.

ARGUMENT FOR
PURSUER.

The actual transmission of a feudal right, or the incorporating a destination of heirs, requires particular forms and technical clauses adapted to the purpose. But in order to create such a personal right in favour of a particular set of heirs, as will entitle them to get the investiture altered by an action to denude, nothing more is necessary than such a deed as contains even a virtual obligation to that effect upon the proprietor or his heirs. The will of the proprietor, if expressed in clear and significant

HAMILTON
v.
DOUGLAS.
1779.

words, amounts to such a virtual obligation, and must, therefore, be held an effectual settlement. There is no charm in the words *dispone* and *oblige*, nor are they necessary for the transmission of heritage.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—In the deed of revocation 1744, there is no conveyance or disposition of the estate,—no institution, or even nomination, of an heir. There is no constitution of any one as disponent or donee of the estate, nor is there any power given to any person to nominate an heir.

No principle is more fundamental in the law of Scotland than that heritage cannot be conveyed by will, and that the clearest intention to convey will not avail. A settlement of heritage must have the characteristic of a deed *inter vivos*. It must be in the form of a disposition, *de presenti*. It must give, disponent, convey, constitute a donee, or contain an obligation to do so. These are acts of immediate exertion, but a testament neither has, nor can have, an immediate effect. The difference between conveyance by deed, and bequeathment by will, as to heritage, is founded on the principles of the feudal system. A bequest by will could have no effect either against the superior or the heir. The act of the superior is necessary in order to give investiture, and originally he was not bound to receive any vassal in the lands, other than the heir expressed in the former investiture, on failure of whom, by the condition of the grant, the right to the lands reverted to the superior himself. The statutes compelling the superior to receive adjudgers and purchasers, proceed upon the principle that, in order to transmit the feu to any other than the heir of the investiture, and to enable the new vassal to obtain an entry from the superior, there must be a disposition, or grant of the lands, conveying the same to him *per verba de presenti*, with procuratory of resignation in the superior's hands for new infeftment, or at least such an obligation constituting a donee, or creditor, as may by process at law be made effectual, by enabling the party to adjudge in the character of a creditor under the deed. The form of a latter will, containing a bequest of lands, ambulatory till the death of the testator, was never held either as a feudal grant of lands, upon which the superior could give investiture

to the person so called, or an obligation which could be made effectual, by a process at law against the heir, so as to adjudge the estate in the character of a creditor. Heritage can alone be transmitted *per verba de presenti*, by actual conveyance, or in such an obligatory form as will operate a conveyance by legal process.

HAMILTON
v.
DOUGLAS.
1779.

In the conjoined processes, the Court repelled the whole defences pleaded by the Duke against Mr. Douglas's declarator, and sustained those pleaded by him against the several processes of declarator at the Duke's instance against him, and also decerned in favour of Mr. Douglas, in the declarator at his instance against the Duke. The Duke having reclaimed, the Court adhered.

JUDGMENT.
Dec. 19, 1796.

Upon appeal to the House of Lords, Lord Chancellor Loughborough presiding,—“It was ordered and adjudged, that the said petition and appeal be, and is hereby discharged the House, and that the said interlocutors therein complained of be, and the same are hereby affirmed.”

Journals of the
House of Lords.
Mar. 29, 1779.

III.—OGILVIE v. MERCER.

On 22d February 1791, at eight o'clock in the evening, Robert Mercer executed a deed of entail in favour of the defender, and various substitutes. He died on the 22d of April thereafter, betwixt ten and eleven o'clock at night, having survived the execution of the deed fifty-nine days and three hours.

Mar. 1, 1796.
NARRATIVE.

This deed having been reduced by the heir-at-law, on the head of death-bed, the defender founded on another deed, executed by Mr. Mercer on the 21st February, and therefore not falling under the law of death-bed. By this deed, Mr. Mercer gave the liferent of a part of his estate to a natural son, and, in order to make the grant effectual, “he bound himself and his *heirs of tailzie in provision* to subscribe and deliver all writs and deeds requisite.”

The deed also contained this clause :—“And I do hereby recommend to MISS CATHERINE MERCER, WHO IS THE HEIR

OGILVIE
v.
MERCER.
1796.

FIRST APPOINTED TO SUCCEED ME, to pay to Charles Mercer the sum of £100 sterling ; and further, as James Miller has been for this considerable time past employed in the management of my affairs, and in carrying on my business, I do hereby recommend to the said Miss Catherine Mercer, and the other heirs upon which my lands and estate may devolve, still to continue him in the management of my said lands and estate."

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—A deed conveying heritage must contain the proper technical expressions which are held to be essential for the purpose of conveyance, and these expressions must be *in verbis de presenti*.

Heritage cannot be alienated, unless by a deed *inter vivos*, and containing dispositive word, *in verbis de presenti*. The clause in which the defender is mentioned as Mr. Mercer's heir, is introduced merely historically, and by no means *eo intuitu* of vesting her with that character, and a reference of this sort is not a sufficient *institutio heredis*. It is not sufficient that a person say in one deed, historically or in the way of narrative, that he had made a settlement. The settlement or conveyance must be *in verbis de presenti*. It must be an actual and immediate exercise of the granter's will or purpose. The deed of 21st February imports no more than an intention to settle the estate upon the defender by another deed ; and as no such deed was habily executed, the mere intention can have no effect.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The deed of the 21st February, taken by itself, is sufficient to exclude the reduction, because the defender is there expressly declared Mr. Mercer's heir ; and any solemn written declaration, though it may not operate as a conveyance, is sufficient to create an obligation upon his heirs-at-law, to give effect to it by an after formal deed. There is no necessity for the deed containing the technical words required by the pursuer, for there is no formula, or fixed set of words, known in the law of Scotland, which a proprietor, upon settling his heritage, must employ. All that is required is a clear and explicit declaration of the will, and, when there can be no doubt with regard to the *voluntas testa-*

toris, it makes little matter in what terms the intention is declared. The deed of 21st February entitles the defender to take the estate, only, instead of taking it directly, it is necessary for her to bring an action against the heir of the investiture, concluding that he should make up titles to the estate, and convey it in her favour. The defender is unable to discover the magic of the words give, grant, and dispoise; and, in order to found an obligation on the heirs of the former investiture, these expressions are not necessary.

Ogilvie
v.
Mercer.
1796.

LORD PRESIDENT CAMPBELL.—An estate cannot, by the law of Scotland, be conveyed by mere will. It requires a disposition, or an obligation to dispoise; and if at any time words, importing a mere *significatio voluntatis*, have been sustained, it has only been in the exercise of reserved faculties, or, indeed, as of an accessory and relative nature. All this doctrine was fully discussed in the last decision of the cause between the Duke of Hamilton v. Douglas, upon the import of certain words in the deed of revocation, 1744. The Court found that this deed was not a settlement of succession, and could not be the ground of any claim; which judgment was affirmed in the House of Lords.

OPINIONS.
Sir Hay Camp-
bell's Session
Papers, MS.
Notes.

The deed of 21st February is merely an accessory deed, referring to that of the 22d, which was framed at the same time, though not executed till too late. *Accessorium sequitur principale*. It is not a substantial deed, and does not even contain a will, or indication of will, either expressed or implied, to give the succession to Miss Mercer, but only *supposes* that such will then existed or was immediately to exist. Supposing, however, it could be construed into an indication of will, and that such an indication should be held as an actual will, it would not be sufficient. *Titius heres esto* was good Roman law, but bad feudal law.

LORD JUSTICE-CLERK BRAXFIELD.—The deed of 21st February is not a settlement by itself, and was not intended as such. But suppose it had said expressly, "Who is hereby appointed my heir," it would not have been sufficient, unless it had been in exercise of a faculty. But truly it is a relative deed, referring to another which has become ineffectual, no matter whether upon death-bed, lunacy, or any other ground.

Sir Hay Camp-
bell's Session
Papers, MS.
Notes.

Ogilvie
v.

Mercer.

1796.

JUDGMENT.
Dec. 10, 1798.

The Court found "That the deed executed by the deceased Robert Mercer, of date 21st February 1791, is not effectual to convey the lands and other heritable subjects which belonged to Mr. Mercer in favour of the defenders, or any of them, nor to support the deed of entail executed by him on the 22d of said month of February."

Journals of the
House of Lords.
March 1, 1796.

On appeal to the House of Lords, Lord Chancellor Thurlow presiding, "It was ordered and adjudged that the said petition and appeal be, and is hereby discharged this House, and that the said several interlocutors therein complained of be, and the same are hereby affirmed."

1. The conveyance of personal rights is by assignation, of real rights by disposition. *Stair*, 3, 1, 1. A disposition may, and sometimes doth signify the alienation of any right, whether real or personal; so the style of translations ordinarily bears, the assignee to transfer and dispone. An assignation is sometimes extended to the disposal of real rights, which are frequently provided, not only to heirs, but to assignees, yet these terms are so appropriated and distinguished, that disposition is applied to the alienation of real rights, and assignation to the alienation of personal rights. *Stair*, 3, 2, 1.

2. A disposition is said to be a conveyance, and so it is taken, not for the dispositive act of the will only, but whatsoever else is requisite to complete the conveyance, as tradition, resignation, possession, though a disposition is oftentimes taken as distinct from these. The act by which men naturally exercise the power of disposal can be

no act of the understanding, that being only contemplative, and nothing active or operative for constituting or transmitting of rights; but it must needs be an act of the will, for by it rights are both acquired, relinquished, and alienated. There may be three acts of the will about the disposal of rights:—a resolution to dispone;—a paction, contract, or obligation to dispone;—and a present will or consent that that which is the disponent's be the acquirer's. Resolution terminates within the resolver, and may be dissolved by a contrary resolution, and so transmits no right. Paction does only constitute or transmit a personal right or obligation, whereby the person obliged may be compelled to transmit the real right. It must needs, then, be the present dispositive will of the owner which conveyeth the right to any other, which is expressed by such words *de presenti*, "Titus disponeth, alienateth, or annalzieth, gifteth, granteth, selleth," &c.,

which cannot properly import an obligation having its effect in the future, though there may be obligations consequent as to delivery, warrandice, &c.; but these terms do express something presently done, and not engaged to be done, and so can be nothing else but the alienation or transmission of the right itself."—*Stair*, 3, 2, 3.

3. "The writ requisite to constitute a fee, must contain the present dispositive act of the superior, by which he disposes to the vassal and his heirs the fee, in whatsoever terms he expresseth it, whether he gift, grant, alienate, sell, or dis-pone, though these several terms expressed may import a different title and warrandice; yea, albeit no cause or title be expressed or implied, but only that the superior disposes; or though the cause or title insinuated be not true. Yet it was sufficient with possession until the solemnity of instruments of sasine was introduced, and is still sufficient when sasine is rightly adhibited. For we follow not that subtlety of annulling deeds, because they are *sine causâ*, but do esteem them as gratuitous donations; and therefore narratives expressing the cause of the disposition, are never inquired into, because, though there were no cause, the disposition is good; and albeit neither the *tenendas*, *reddendo*, or the *modus acquirendi*, be expressed, yet, if the property was the disponent's, and he do but express the disposition to be in fee and heritage, it is valid; for the *reddendo* is understood to be services accustomed in ward-holdings; and

thereby will be carried, though not expressed, all the parts and pertinents of the fee. And therefore any disposition *per verba de presenti* in fee, is valid as to that part of the infeftment, and although the disposition contained an obligation to grant charters, yet the not granting thereof doth not pre-judge."—*Stair*, 2, 3, 14.

4. "Precepts of *clare constat* are also sufficient, seeing they contain a precept to infeft such a person as vassal, which implies the dispositive will of the superior; and therefore is valid in place of a charter from its date, albeit it hath no effect against singular successors, as to that vassal's predecessor's rights, which must be instructed by the rights themselves, and not by the superior's acknowledgment. And for the same reason, other precepts of sasine, not relating to particular charters or sasines, but either simple or bearing *secundum chartam conficiendam*, are sufficient, although these charters be never granted. But since writ became to be an essential solemnity of fees, the superior's present dispositive act must be in writ, but his preterit declaratory act, acknowledging such a person and his predecessors to be vassals, and have the fee, or his obligation to grant the fee, though never so express, which relates but to a disposition *de futuro*, will not supply a charter, though clad with real possession, or having sasine by instrument, bearing to be *propriis manibus*, though by these the superior may be compelled to grant charters solemn and complete,

bearing expressly all the clauses ordinary in such writs."—*Stair*, 2, 3, 14.

5. An infeftment *propriis manibus*, without any antecedent disposition or precept, would also be sufficient for the purpose of transmitting land, provided the instrument of sasine was signed by the granter as well as by the notary. Lord Stair does not notice the case of an instrument of sasine, *propriis manibus*, being signed by the granter. But a few years after the first edition of his work was published, the point occurred in the case of *KING v. CHALMERS*, Nov. 15, 1682, where it was found, that a sasine "not being subscribed by the granter, nor adminiculated by any subscribed writ under his hand, to be only the assertion of the notary, and so not a sufficient title to quarrel the defender's right." In treating of extinction of infeftments by resignation *ad remanentiam*, Lord Stair observes, "And though instruments of resignation used to be by procurators warranted by a procuratory of resignation, yet as there may be sasines given by the superior *propriis manibus*, so may there be resignations by the vassal himself. But in both, the instrument of resignation alone is not sufficient as being but the assertion of a notary, but they must have for their warrant a disposition or other adminicle; and therefore it is statuted, Parl. 1563, c. 81, that where such resignations are by procurators, the procuratories be subscribed by the party or notaries, and if the resignation be *propriis manibus*, that the instrument be so subscri-

ed, otherwise to be null; because the subscription of the instrument is, in that case, the only probatation of the warrant thereof. But if there be a disposition or obligation to infeft, the instrument of resignation, though not subscribed by the resigner, will be sufficient, as warranted by the disposition or obligation."—*Stair*, 2, 11, 2.

6. Erskine observes—"In order to give validity to a sasine *propriis manibus*, where there is no antecedent deed to support it, it must be signed not only by the notary, but by the granter, for there cannot be in any case an effectual conveyance of a feudal right, without some deed signed by the proprietor divesting himself; and the law gives no credit to a notarial sasine *per se*, which is but the assertion of a third party, as evidence that the proprietor was divested."—*Erskine*, 2, 3, 38.

7. In *SHANKS v. KIRK-SESSION OF CERES*, January 27, 1797, the instrument stated that the party had given infeftment *propriis manibus* to his wife in liferent, and his son in fee, but the instrument was signed by the notary only. The instrument was found null for want of the father's subscription, as there was no previous disposition by him. LORD PRESIDENT CAMPBELL observed,—“As to the instrument *propriis manibus*, it would be very good as a short hand way of doing the thing, if it had been signed by the father. Not being signed by the father, it is good for nothing.” LORD BRAXFIELD observed,—“Where granter signs a disposition, the sasine *propriis manibus*

does not need his hand. Facts fall under the observation of the notary. But where no previous deed his signature is essential."—*MS. Notes, Sir Hay Campbell's Session Papers.*

8. In *KIBBLE v. ROSS*, December 4, 1804, the instrument was signed by the granter of the sasine *propriis manibus*, and the names of two witnesses were adhibited, but it was not attested in the manner of a regular probative deed. The usual docquet of the notary-public followed the subscriptions of the granter and the witnesses. Against the validity of the instrument it was pleaded—Every conveyance of a right must be legally authenticated, and the Act 1681 has defined the solemnities necessary to validate such a deed. There being no antecedent writing, the sasine itself in this case is the conveyance, which consequently requires the same solemnities as an original conveyance does. As the law has, in the case of a sasine *propriis manibus*, dispensed with the necessity of a separate disposition, the subscription to which must have been properly authenticated, it surely never meant to extend this privilege still farther, and give the same effect to a subscription not authenticated at all. The Court, after an inquiry into the practice, sustained the infetment. The elder LORD MEADOWBANK, however, strongly dissented, and observed,—"A sasine *propriis manibus* is both deed and sasine; why otherwise does the granter sign the sasine? Practice is erroneous, and shakes to the bottom

our principle that heritage passes only by a regular deed. If the practice be inveterate, we may repel the objection here, but we must make an act of sederunt for the future. I shall otherwise enter my protest against it."—*MS. Notes, Hume's Session Papers.*

9. In *ANDERSON v. ANDERSON*, January 31, 1828, the instrument of sasine bore,—“Whereupon, and upon all and sundry the premises, the said Henry Anderson asked and took instruments in the hands of me, notary-public subscribing; and the said Henry Anderson being so infet, he, for the love and affection which he has and bears for Margaret Thomson or Anderson, his wife, gave and delivered to her liferent state and sasine, real, actual, and corporal possession of all and whole the subjects above specified, &c., and did so infet her in liferent for her liferent use allenary; whereupon the said attorney for the said Margaret Thomson or Anderson required instruments under the hands of me, notary-public.” No previous disposition or written obligation had been granted by Anderson, but he subscribed the instrument of sasine along with the notary. The instrument did not bear that Anderson had, *ex propriis manibus*, delivered to his wife liferent state and sasine. Neither was it stated in the body of the instrument that it was subscribed by Anderson, nor by whom it was written, nor that Anderson's subscription was made in presence of the witnesses who were merely witnesses to the acts done on the ground. On

Anderson's death, his brother brought an action of reduction of the defender's liferent right. The defender argued that there was no necessity for the words *ex propriis manibus*, or other words in English of the same import, being introduced into the instrument, provided that there were words bearing delivery of a liferent, and that a testing clause was neither usual nor requisite in instruments of sasine; that the instrument was subscribed by Anderson, and the witnesses attested that they had seen the whole transaction gone through. The defender farther argued that the fact of the liferent right having been granted, was established by an heritable bond and a trust-disposition granted by her husband after the date of her infeftment, in which he expressly referred to the instrument of sasine in favour of himself and the defender for the respective rights of liferent and fee therein mentioned. LORD NEWTON assolized the defender, and observed in a note,—“There can be no doubt that a sasine given *propriis manibus* by a husband to a wife, although not in implement of any previous obligation, is effectual, provided the provision is reasonable in the circumstances of the parties; and it does not appear to the Lord Ordinary that in the present case the liferent of the tenement was irrational or exorbitant. The objection to the terms of the sasine, that the words *ex propriis manibus*, or English words of the same import, are not used, seems immaterial, as there is no reason to

think that they are necessary as an essential form; and the instrument expressly bears, that the husband was personally present, and himself received infeftment in the subject; and that, being so infeft, he gave liferent state and sasine to his wife, and that by delivery to her attorney of earth and stone of the ground. The other objection, that although the husband subscribes the deed, his doing so is not mentioned in the body of it, and, of course, is no way attested by the witnesses, appears to have some weight; but any difficulty arising from this circumstance is in a great measure removed by the husband's acknowledgment of his wife's right of liferent, contained in the heritable bond subsequently granted by him.” The Court unanimously adhered.

10. “The most ordinary and important conveyances are of lands and annualrents, which pass by infeftment; for perfecting whereof, there must not only be a disposition, but also a resignation in the hands of the superior, and new infeftment granted by him to the acquirer thereupon, or by confirmation, or for obedience upon apprising or adjudication. For dispositions of lands to be holden of the granter do not transmit the granter's right, because he continues superior in the direct dominion, but it becomes an original right, constituting a new subaltern infeftment. Resignation is either in favour of the superior himself, for consolidating the property with the superiority, and therefore is called resignation *ad*

perpetuam remanentiam; or it is a resignation in the superior's hands in favour of the resigner himself, or in favour of an acquirer, and therefore is called resignation *in favorem*. The first of these is no transmission, but an extinction of the fee. The second is not properly a transmission, because it passeth not from, but returneth to, the resigner, yet ordinarily under diverse considerations, as when he resigns from himself and such heirs, in favour of himself and other heirs, or when he resigns a wardholding, that it may be returned blench or feu, in so far it is a transmission, and partakes of the third, which is most properly a transmission. A resignation must proceed on a disposition, or procuratory of resignation, having in it the effects of a disposition, which must be in writ, for the instrument of resignation being but the assertion of a notary, will not be sufficient alone, without an adminicle in writ, and though a resignation *propriis manibus* can have no procuratory, yet the disposition, whereupon it proceeds, must be shown as the warrant of the instrument of resignation."—*Stair*, 3, 2, 8.

"A procuratory of resignation is truly of the nature of a disposition. It is indeed in form, as well as in substance, a direct conveyance of the lands to the superior for new infeftment to the heir specified, or, substantially, a conveyance to those heirs, mediately, and by the intervention of the superior. It is, therefore, in itself a proper dispositive deed."—*The Court in RENTON v. ANSTRUTHER*, Dec. 14, 1843.

11. A conveyance of land would not be deemed valid, in which the word "DISPONE" was omitted. This word appears to be a *vox signata*, the use of which is essential to the validity of a conveyance. In the case of *HAMILTON v. MACDOWAL*, March 3, 1815, the elder LORD MEADOWBANK observed,—"If there is a word in Scotch law language which is technical, it is the word *dispone*. There are very few technical expressions in the law of Scotland, but there are some which have been held essentially necessary in order to give effect to some kinds of deeds. *Dispone* is one of them, and is held to be necessary in all conveyances of heritage. I remember once when at the Bar, of attempting to shew that the essence of all such conveyances lay in the use of *verba de presenti*, as distinguishing them from wills, which are expressed in *verba de futuro*, and that it was of no consequence what the words employed were. That was my argument, and I laboured hard to make out that *give* and *grant* were quite enough, but it would not do. I lost the cause unanimously. The word *dispone* was held to be quite technically necessary, and I was not listened to. I take it, that in all conveyances from one person to another *a me* and *de me*, the word *dispone* is requisite."

12. The case referred to by Lord Meadowbank was most probably that of *HENDERSON v. SELKRIG*, June 10, 1795, in which his Lordship was Counsel for the unsuccessful party. The words of

the deed were, "I *give* all my real estates in Scotland to my brother and his heirs in trust." The brother as trustee pleaded the authority of Erskine, 3, 8, 20, who observes, — "A man may effectually settle his heritage in a testamentary deed, reserving to himself the liferent, and a power of revocation, provided he makes use in the conveying clause of the words, '*give, grant OR dispo*ne, in place of *legate or bequeath*.'" On the margin of the pursuer's pleading, where this passage is cited, LORD PRESIDENT CAMPBELL has written, 'He ought to have said, *give, grant AND dispo*ne.'

13. Another attempt was made in the case of STEWART v. STEWART, Nov. 16, 1803, to have a settlement of land sustained in which the word *dispo*ne was not used. The defender pleaded :—The distinction between a deed having the words, *legate* and *bequeath*, and one having the words *give, grant* and *dispo*ne, is a mere quibble. In a feudal sense, no doubt a tes-

tament conveying heritage by the words *leave and bequeath* is not a valid conveyance, because it wants procuratory and precept, but it is no better in a feudal sense, by having the words, *give, grant and dispo*ne, if it also wants procuratory and precept. If, therefore, in the latter case, the feudal effect is overlooked and the intentions of the testator are now to be carried into effect by the mode or invention of an adjudication in implement and action to denude, the same relief ought not to be denied in the former case. Baron Hume in his decisions observes,— "The case could hardly be said to be open to any difference of opinion. Our whole system of settlement of heritage continues to rest on the notion of an immediate conveyance, and no other sort of phrase, how clear soever, as an expression of the party's will, is sufficient to make amends for the want of the dispositive words *de presenti*."—*Hume's Decisions*, p. 881.

The Superiority of Lands may be conveyed, alone, without a conveyance of the Lands themselves.

LORD ARCHIBALD HAMILTON v. BOGLE.

Feb. 28, 1819.

NARRATIVE.

In 1816, George Oswald expedite a Crown Charter of Resignation and Confirmation. The dispositive clause in the Charter was in the following terms: "*Totum et integrum DOMINIUM DIRECTUM vel JUS SUPERIORITATIS harum partium et portionum postea specificat. de viginti librat. terrarum antiqui extentus de Provan.*"

The Precept of Sasine was in these terms : "*Salutem mandamus vobis et præcipimus quatenus prefato Georgio Oswald armigero vel suo certo actornato latori presentium sasinam totius et integri præfati DOMINII DIRECTI vel JURIS SUPERIORITATIS terrarum antea specificat.*"

HAMILTON
v.
BOGLE.
1819.

In 1819, Mr. Oswald conveyed the said superiority to the respondent, and assigned to him the unexecuted Precept of Sasine contained in the Crown Charter. The disposition by Mr. Oswald conveyed to the respondent "all and whole the DOMINIUM DIRECTUM or right of superiority of all and whole these parts and portions after specified of the twenty pound land of old extent of Provan. The Instrument of Sasine was expedite by the respondent on the unexecuted Precept in the Crown Charter, and bore, that the notary *dedit tradiditque præfato Andreæ Bogle sasinam hereditariam realem actualem et corporalem possessionem totius et integri præfati DOMINII DIRECTI vel JURIS SUPERIORITATIS terrarum antea specificat.*"

In virtue of these titles, the respondent was admitted upon the roll of freeholders in the County of Lanark. Against this enrolment a petition and complaint was presented on the part of Lord Archibald Hamilton. The following interlocutor was thereafter pronounced : "The Lords having resumed consideration of this petition and complaint,—They declare that they will hear one counsel for each party in their own presence, on the objection stated in the replies, namely, that the conveyance in favour of the respondent is not a legal or feudal conveyance of the lands, but of the *dominium directum* or superiority only, and appoint the counsel to be prepared accordingly."

PLEADED FOR THE PETITIONER.—DOMINUS DIRECTUS expresses the legal character of the person from whom lands are held by feudal tenure. DOMINIUM DIRECTUM expresses the relation in which that individual stands towards the lands, or the character of the right which he has to them. The character of *dominus directus* cannot *eo nomine* be made the subject of direct transference or conveyance. Neither can the relation of *dominium directum* be capable of such transference, and neither the one nor the other of these terms expresses the subject from the transference of which such character and relation arise. The

ARGUMENT FOR
PETITIONER.

HAMILTON
v.
BOGLE.
1819.

character of *dominus*, and the relation of *dominium*, are the legal results of the transference of the subject, and it is therefore illogical to render that the subject of conveyance, which is properly and correctly one of the results of the conveyance. No man can be rendered the *dominus* of any thing, and no man can have the *dominium* of any thing, except by transference or disposition, and delivery of the thing itself.

When a feudal proprietor infeft in the lands, executes an infeudation thereof, a new legal relation is created, and these persons in relation to each other, are termed superior and vassal. The interest which each has in the land is expressed by the terms DOMINIUM DIRECTUM in the superior, and *dominium utile* in the vassal. To render an infeudation valid, the granter must be infeft in the lands. His prior and paramount infeftment remains unimpaired and unextinguished, except by the qualification of the subaltern right, and is capable, when followed by possession for forty years, of reacquiring the whole right in the lands. The original principle of the feudal law is, that the infeftment of the superior in the property remained and was essential to his right. The infeudation was granted *retenta proprietate seu dominio directo*, and the infeftment of the superior was neither totally nor partially extinguished. It is in virtue of the superior's subsisting infeftment, that a resignation *ad remanentiam* is an extinction of the base right, and leaves in the superior the *plenum dominium* as much unencumbered as before infeudation took place. Where the *plenum dominium* is not in the superior, a practice has crept in of excepting in the clause of warrandice all feu-rights. But it is not necessary in this exception to enumerate all the feu-rights which may have been granted. The exception is expressed in general terms. Neither the clause of warrandice, nor the exception from it, are necessary for the constitution or transference of the feudal right. The subinfeudations are in no respect different in their nature from heritable bonds, or other heritable incumbrances. These *ob majorem cautelam* would also be excepted in the clause of warrandice, if such exception was agreeable to the understanding of parties in the personal contract, in implement of which the lands are disposed.

In order, therefore, to constitute a right of superiority, the

lands themselves must be disposed to the person who is to be constituted superior, and the tradition of the lands must be authorized and given to complete the right. An effectual infeudation cannot be constituted, except by a person infeft in the lands, and all the rights or attributes of superiority depend upon and can only be traced to the prior and paramount infeftment which existed in the superior before infeudation. The infeftment too of a superior by progress, must be of the same character and extent with that of the original superior from whom the right is derived. The divestiture of the original superior, and the investiture of the superior by progress, must be commensurate. It is impossible to hold that the terms, "All and whole the *dominium directum*," and the terms, "All and whole the lands," are synonymous in legal language. To do so would be a violation of the received language, and of the systematic principles of the law of Scotland.

HAMILTON
v.
BOGLE.
1819.

PLEADED FOR THE RESPONDENT.—By the statute 1681, it is expressly provided, that superiority shall give the right of enrolment. In conveying a superiority, it is no doubt common to dispose the lands. There is no principle, however, on which it can be held, that a bare right of superiority is not capable of being conveyed by its own appropriate name. Where a person feus out lands to be held of himself, the *plenum dominium* is divided into two parts, which are distinguished by the terms, *dominium directum* and *dominium utile*. Since the superior possesses only the limited interest of superiority, there seems no reason why in carrying it he should be obliged to make use of terms which import a grant of the full right of property, which he has not to bestow, and which forces him in an after part of the deed to introduce a clause restricting his conveyance. There seems no valid reason why he should be prevented from using at the first, such words as express precisely the right which he possesses, and which only he can convey.

ARGUMENT FOR
RESPONDENT.

A superior may convey effectually, by disposing the lands themselves, under burden of the feu-rights which can affect them. But a disposition of the *dominium directum* is the same thing in other words. If the latter term were to be defined, it

HAMILTON
v.
BOGLE.
1819.
JUDGMENT.
Feb. 28, 1819.

can be defined in no other way than by saying, that it is the property burdened with a feu right.

On advising the case, the Court pronounced the following interlocutor: "The Lords having advised this petition and complaint, with the answers thereto, replies, and duplies, and having heard the counsel for the parties,—They repel the whole several objections to the respondent's enrolment; dismiss said petition and complaint, assoilzie the respondent from the conclusions of the same, and decern."

OPINIONS.

LORD BALGRAY observed,—“This is a question of considerable importance, and one which must be decided on principles of law, and on these solely. No doubt the legal principle is, where a person conveys away the superiority of his lands, he should convey to his disponent the *lands themselves*, excepting from the clause of warrandice of the title-deeds, the *feu-rights* and *charters* granted by himself, or by his predecessors, to the vassals in the lands. But the conclusion by no means follows, that, although this is the most feudal and correct mode of framing the conveyance, no other mode is good.

“In feudal language, the land is the *substratum* of the earth, which gives the proprietor of it two sets of rights, the one *superior*, the other *subordinate*. The *dominium directum*, and the *dominium utile*, are distinct and separate rights, requiring distinct and separate deeds of conveyance; and all the rights consequent upon the possession of the one or the other, remain separate and distinct to the end of time, till some act is done to unite them. The *dominium directum* is a real estate as much as the *dominium utile*. It is as capable of conveyance as the *dominium utile*. What I hesitate about is this. The word ‘*fee*’ conveys not only *that relation* between the *person* acquiring the right, and the *thing* conveyed, which puts him in possession of the subject of the grant,—it also means *privileges*,—and it also, in feudal law, means *the thing itself*. It conveys not only the right, but the thing itself, which is the object of the right. Lord Stair lays down this as the legal explanation of the word *fee*.

“The *dominium directum* and the *dominium utile* are two separate and distinct estates; and it is quite a mistake to say that

the *dominium utile* is a *burden* upon the *dominium directum*. It is not a burden on the *dominium directum*. It is a separate estate, created by law, distinct from the *dominium directum*, and totally independent of it. Therefore, if a charter is granted by the Crown of the *dominium directum* of lands, strip it of its legal clothing, what does it convey? It conveys to the superior a right of property in his own lands holding of the Crown by which he is entitled to draw the feu-duties and casualties belonging to him as superior. What is the *dominium utile*? It is *the property of lands* belonging to *the vassals*, which they hold under a superior for payment of certain feu-duties, in the same way as the superior again holds his property of the Crown for payment of feu or other duties. It is that right which is vested in them by the grant from the superior. Where is the difference between a grant of the lands out and out, excepting the feu-rights, and a grant of the *dominium directum* of the lands without such an exception? The effect of these grants is the same, both of them operating as conveyances of the right of superiority merely. Where is the distinction between the two? I cannot see it. I convey away that property bestowed by law upon me, as superior, to my disponent; and what is the difference whether the Crown has bestowed the right upon me in one or other of these ways?

“The complainant says the *dominium directum* is so much wind, but that construction of the term is not solid. What is conveyed is the right of superiority of the lands, and that right is the object of the infeftment, and not a change of the state of possession of the lands themselves. The object of the conveyance is a change of the possession of the right, and not of the thing which is the subject of the right. If the right of superiority of the lands is *metaphysical*, the right to take the produce is equally so. If the obligation on the vassal to deliver a certain proportion of the yearly produce of the lands to the superior, or otherwise to forfeit his right, is capable of being transferred, how can it be said that the right of the superior to seize upon the produce, if the vassal should fail in making the stipulated payment of feu-duty, is incapable of transference? But the right of the superior to seize the produce for payment of his feu-duties, is *not* incapable of transference.

HAMILTON
v.
BOGLE,
1819.

HAMILTON
v.
BOGLE.
1819.

“ If the right of a person entering to possession of the property is capable of being transmitted to another, why may not this take place as well in regard to the *superiority* as to the property ? Infestment is a mode of delivery of a thing symbolically, which we are not capable of apprehending by actual delivery. This mode of delivery is not confined to lands, but is applicable to delivery of those rights which are created over lands. That is the spirit of it. There are many other things besides lands, of which possession is delivered in this way, *ex. gr.* the right of patronage. Where is the body of the thing there ? It is no more than a right ; and yet it is the subject of infestment. Where is there a more complete right than a right of jurisdiction over a certain tract of country ? and yet it cannot be disputed that there are heritable jurisdictions which are carried by infestment. A *dominium directum* is therefore a real estate, and the infestment before us is a valid infestment.”

LORD PRESIDENT HOPE observed,—“ I differ from your Lordships in this case fundamentally ; but, as I stand alone in my opinion, your Lordships’ decision will go out as an unanimous judgment of the Court, with a single exception. To my mind, the distinction is quite intelligible between a right to a thing and the thing itself. *Dominium directum* is that right which is acquired by delivery of the thing which is the subject of the *dominium*. The thing itself is totally different from the *dominium*. It is admitted by Lord Stair, that there is a preferable mode of conveying superiority. Why, if both are equally good in the end, any preference should be given to one mode over another, does not seem to be very clear ; and I certainly do not see why Lord Stair should say that conveyances of superiority were sometimes drawn up in this mode through the ignorance of writers, if an infestment given in the one way be as good as infestment given in the other. Lord Stair must have meant, when he made use of this expression, that infestments given in the *dominium directum* of lands were wrong, otherwise he put no difference between ignorance and wisdom. The *dominium directum* is the right to a subject which makes me the original and proper proprietor of that subject. I may or I may not have a vassal. The lands are conveyed to me out and out, and they ought in all cases to be so simply ; and

it is only *ob majorem cautelam* that you except the feu-rights. There is no occasion whatever to except the feu-rights. The infeftment of the vassal is on record, which effectually saves his right ; and it is only *ob majorem cautelam* that you except his right. If the vassal has put his infeftment on record, which no doubt he always will do, he runs no risk from the unqualified sasine of the superior.

HAMILTON
v.
BOGLE.
1819.

“ I should like to know, if this conveyance is good here, what becomes of the whole doctrine of our law on the subject of resignations *ad remanentiam*, and *in favorem* ? It is established law that, by resignation *ad remanentiam*, in the hands of the superior, the rights of property and superiority are consolidated ; the right of property merges in the superiority ; and the superior remains vested in both without a new infeftment in the property under his original infeftment in the lands. How has Mr. Bogle been infeft here ? Has he been infeft in the lands ? No ; but in a *jus incorporale*,—not in the lands,—and yet, by a resignation *ad remanentiam*, made by the vassal, it is argued, that he would be vested in the property of lands which he never had, to all intents and purposes, as if he had been originally infeft in the lands. The right of the superior is fortified by resignation alone, merely because he was previously infeft in the lands ; and the sasine of the vassal attaches to that of the superior.

“ In the case of resignations *in favorem*, the same principle is seen to operate. The vassal resigns his infeftment in the hands of his superior in favour, and for new infeftment to be given to the vassal himself, or a certain series of heirs ; but here, has the superior a right to deliver the lands of new, if he has not been originally infeft in the lands ? The vassal delivers his lands into my hands as his superior standing feudally infeft in the lands. The lands become mine by that resignation ; and thus I have right to deliver them back again to my vassal.

“ I cannot see, if this conveyance of the *dominium directum* be good, where the necessity can exist at all for the separation of the property from the superiority. I, the superior, am infeft in both ; and I convey to you the *dominium utile*, and I convey to a third party the *jus superioritatis*. Where is the use of separating the two rights ? It is established, however, that this cannot be done. A precept was necessary for infeftment in the

HAMILTON
v.
BOGLE.
1819.

lands themselves, in order to convey the right to the lands ; and, because the vassal might not convey the lands back, it was necessary to have a trustee, who remains the vassal.

“Notwithstanding all I have heard, I remain decidedly of opinion, that this mode of conveyance of the *dominium directum* of the lands of Provan, in favour of Mr. Bogle, is radically null and void.”

1. “Having now shown what is the interest of the vassal in the fee, it will be the more easy to find out what the superior by his right of the superiority retaineth : For what is proper to the fee, and is not disposed to the vassal, is reserved to the superior ; and it is either constituted as belonging to the superior constantly or casually. The constant right of the superior standeth mainly in these particulars. First, superiority itself is *dominium directum*, as the tenantry is but *dominium utile*, and, therefore, the superior must be infeft, as well as the vassal, and that in the lands or tenement itself, simply without mention of the superiority, which followeth upon the concession of the fee in tenantry, though sometimes, through the ignorance of writers, infeftments bear expressly to be ‘of the superiority only.’”—*Stair*, 2, 4, 1.

2. “There must remain a right in the superior, which is called *dominium directum*, and withal a right in the vassal, called *dominium utile*. The reason of this distinction and terms thereof is, because it can hardly be deter-

mined that the right of property is either in the superior or vassal alone, so that the other should only have a servitude upon it, though some have thought superiority but a servitude, the property being in the vassal ; and others have thought the fee itself to be but a servitude, to wit, the perpetual use and fruit. Yet the reconciliation and satisfaction of both have been well found out in this distinction, whereby neither’s interest is called a servitude ; but by the resemblance of the distinction in law betwixt *jura et actiones directæ*, and those which for resemblance were reductive thereto, and therefore called *utiles*, the superior’s right is called *dominium directum*, and the vassal’s *dominium utile* ; and without these the right cannot consist. As there must be a right in the superior, and another in the vassal, so the vassal in his right must necessarily hold of, and acknowledge the superior, as having the direct right in the fee, otherwise the two distinct rights without this subordination, will make but two partial allodial rights.”—*Stair*, 2, 3, 7.

3. In the case of LAIRD OF

LAGG v. HIS TENANTS, Nov. 19, 1624, M. 13787, a sasine of the naked superiority was sustained as a sufficient title for pursuing a removing against any one who could not allege an heritable right of property, or some other right whereby they might maintain themselves in the possession of the lands. The defenders in this case alleged that there was no necessity to clothe themselves with any right until the time that they were desired to remove, by one who had right to the property, seeing they excluded the pursuer's title, which being *per expressum* only of the superiority, presumes necessarily that there was another proprietor in whose person the right to remove only behoved to subsist.

4. In NORTON v. ANDERSON, July 6, 1813, the facts were the following: In 1785, Patrick M'Dowal expedie a Crown Charter of the lands of Auchingibbert. In 1788, he conveyed the lands to William Bushby, and assigned to him the unexecuted precept in the Crown Charter. Mr. Bushby was never infeft, but in 1806, he disposed the *dominium utile* of part of the lands to Messrs. Ewart and MacMurdo, to be held of him in feu-farm, and Messrs. Ewart and MacMurdo were infeft on the disposition. In 1810, Mr. Bushby sold to Baron Norton, "All and whole the lands of Auchingibbert," which were particularly described, "as also the *dominium directum* of these parts of the lands of Auchingibbert, which were lately sold by me to Samuel Ewart and William MacMurdo." Baron Norton was infeft on the

unexecuted precept contained in the Crown Charter of 1785, and claimed to be enrolled on this title as a freeholder in the county of Dumfries. The freeholders refused to enrol, and the Court sustained their judgment.

5. The objection taken to Baron Norton's title was, that he was infeft only in the *dominium directum*, and that he had no vassal. The freeholders *pleaded*,—To constitute a good right of superiority, there must be a vassal in the lands. There was no vassal constituted before the conveyance to Baron Norton, because the granter of the feu-rights never was himself infeft, and there can be no vassal now constituted, because the petitioner has only an infeftment in the *dominium directum*. There is nothing else in his person, and, consequently, nothing that can accresce to the infeftments taken on the feu-rights. Baron Norton *pleaded*,—Mr. Bushby held a personal right, both as to the superiority and property. He first sells the right of property to the vassal, and then he sells the superiority to another. He thus separates the personal right of property and superiority in his person. He sells the superiority with reservation of the feus, and the disponee thus stood bound to give effect to the subsisting feu-rights. If Mr. Bushby had taken infeftment on the Crown Charter assigned to him, his infeftment would have accresced to the feu-disponees. The same effect must follow from the infeftment taken by the complainer.

6. In the Report of the *Faculty*

Collection it is stated, that it was held by the Court, that an error had been committed fatal to Baron Norton's claim: That there had been no proper separation of the property and superiority: That it was now fixed law, that such a separation was not effected by a disposition of the property under reservation of the superiority: That it must be done by separate deeds; and that there could be no accrescence of the infeftment of Baron Norton to those of Messrs. Ewart and MacMurdo, for the Baron's infeftment was merely of the *dominium directum*, and not of the whole property.

7. Baron Hume on the pleadings in the case, has written,—“The difficulty is, that the feu is from one who never had a feudal right, and never came to have one. No feudal right ever comes to him the holder of the personal right. It comes to his singular successor. To make the feu-disponees vassals, Baron Norton must have the whole interest in the lands. If infeft in the whole, his right might possibly accresce, but not by partial infeftment.” The Court divided. *For* the petitioner, Lords Succoth and Hermand; *against*, Lord President Hope, Lord Balmuto, and Lord Alloway.—*MS. Notes, Baron Hume's Session Papers.*

8. In *PARK v. ROBERTSON*, May 16, 1816, an infeftment in the superiority was found an insufficient title to insist in an action of non-entry. In *MACKENZIE v. MACKENZIE*, December 14, 1822, the

deed conveyed “the superiority of all and whole the lands,” &c., but the granter obliged himself to infeft the disponent in “the lands and others before described;” and he farther assigned an unexecuted precept of sasine contained in a Crown Charter of resignation; and on this precept the disponent was infeft in the lands themselves. His title to insist in an action of non-entry was sustained. In *HILL v. DUKE OF MONTROSE*, July 10, 1828, the deed was a conveyance of certain lands, “so far allenary as may be extended to the right of superiority thereof, and to the feu and blench duties, and other duties, and other casualties thereof, if any be;” and the infeftment was in similar terms. This was held a valid title in an action of non-entry.

9. In *GARDNER v. TRINITY HOUSE OF LEITH*, February 9, 1841, the original deed conveyed “All and whole the right of superiority or *dominium directum* of all and sundry the lands.” LORD MONCREIFF observed,—“I cannot lay aside the case of *Hamilton*, where the sasine was in the same terms as here. It was a solemn decision, and I cannot go against it.” LORD MEDWYN observed,—“The sasine in the case of the *Laird of Lagg*, in 1624, was the same as in this; and the form of infeftment in the superiority often appears in the titles of that century, when we know feudal principles were most strictly attended to.”

A Conveyance granted by a party without having right to the subject conveyed, but with consent of the true owner, will be effectual.

BUCHAN v. COCKBURN.

In 1730, Sir Alexander Cockburn of Langton, sold certain lands to the pursuer. The disposition was granted with consent of his son, and also with consent of the defender, Sir William Cockburn, for all right and title he had or could pretend to either as creditor on the estate, or in any other manner of way whatsoever. The dispositive clause was in these terms :—"Be it known, &c., me, Sir Alexander Cockburn of Langton, with consent of Mr. Archibald Cockburn, my son, and me, Mr. Archibald for myself, for all right I have or can pretend to the lands and others after disposed, and also *with consent of* Sir William Cockburn of that ilk, for all right and title he has or can pretend thereto, either as creditor of the said estate, or in any other manner of way whatsoever, and us all with one consent for a certain sum of money, as the adequate price and value of the lands, teinds, and others after disposed, presently advanced and paid to us, the said Sir Alexander and Mr. Archibald Cockburn. Therefore wit ye us, the said Sir Alexander and Mr. Archibald, with mutual advice and consent foresaid, for our several rights and interests, *and also with consent of the said Sir William Cockburn*, to have sold, alienated, and disposed, as we by these presents sell, alienate, and dispoise from us, our heirs and successors whatsoever, to and in favour of the said George Buchan, his heirs and assignees whatsoever." The disposition was duly executed by Sir Alexander and his son, and Sir William Cockburn.

July 14, 1789.

NARRATIVE.

The pursuer thereafter brought an action against the defender, in which, libelling on the said disposition, he concluded that the defender should be decerned to exhibit the several rights and securities in his person affecting the estate, and to convey or communicate them to the pursuer, for security in defence of his purchase.

PLEADED FOR THE PURSUER.—The import of a consent to a disposition of property is well known and fixed in law. Its

ARGUMENT FOR
PURSUER.

BUCHAN
v.
COCKBURN.
1789.

effect is to make the *dominium* pass for all right that was in the consenter, as well as in the principal disponer. This would be implied in the naked consent of one having right to a conveyance made by another. There is still less reason to doubt that the right of the consenter is transferred, when he concurs or joins with the disponer for all right and title he has in any manner of way. For it is not left to conjecture or implication, but the intention to convey the right of such consenter is in express words declared. The defender not only concurred in the dispositive clause, but also in the procuratory of resignation. This is more than sufficient to infer the conclusion of the present action, for an express and particular communication of his titles. A party who disposes the absolute property, is obliged to deliver or make forthcoming the progress of titles which he has to the same. So also the party who disposes in virtue of particular rights or incumbrances in his person, ought in like manner to make good his disposition by delivering his titles, if he has no other use for them, and if he has, by conveying and allowing extracts to the purchaser.

The estate of Langton was subject to many incumbrances besides those in the person of the defender, but those held by him were reckoned to be among the most preferable. It could, however, signify little to the pursuer, that the defender should barely renounce any claim he had upon the lands. For he not being the sole creditor, his renunciation would still leave the lands exposed to the next creditors after him, whose diligences also affected the lands. The consent of the defender was therefore evidently taken, to the end that his titles might serve to secure the pursuer against other incumbrances less preferable on the lands. The pursuer, therefore, is liable, under the disposition 1730, to grant a special conveyance or communication of the rights, debts, and diligences in his person, affecting the lands purchased by the pursuer, for security of his purchase.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The legal import of a consent to the deed of another, is no more than a *non repugnantia*, or yielding a preference to the right consented to, but is not a transmission or conveyance of the rights in the person of the

consenter. The import of the defender's consent, therefore, was no other than that he should not oppose the sale made to the pursuer, nor his right of property arising therefrom, upon any right in the defender's person—that he should not compete with the pursuer thereupon, but allow him a preference to the defender's rights, although otherwise these rights might be preferable to the right acquired by the pursuer.

BUCHAN
v.
COCKBURN.
1789.

If a creditor who has the only infeftment of an annualrent upon an estate, consents to his debtor granting a second infeftment of annualrent upon the same estate, nothing is supposed to be intended by this consent, except that the second creditor is to be allowed to draw his debt out of the estate upon his own right, without any opposition from the infeftment of the first creditor. It is impossible to imagine that the first creditor meant in such a case to transmit his debt and infeftment to the second, in order to enable him to possess the lands upon his preferable right, and thereby to extinguish his debt, when he had got no consideration for such a transmission, nor adhibited any other concurrence to the second creditor's right than a *nudus consensus* or *non repugnantia*.

In the same way, when a consent is adhibited to a sale, the import of it is none other than that the creditor consenting passes from his right of security, so far as it affects the lands sold, and restricts himself to the remaining lands. He is bound by his consent to leave the purchaser in quiet possession of the lands sold, and to take his hazard of recovering his debts out of other subjects. But there is a wide difference between this and the transmission of the consenter's debts. For, if that is supposed, the purchaser might attribute his possession to the debts conveyed to him, and by his possession extinguish them, so that the consenter could not afterwards recover payment of them out of any other subject belonging to his debtor. The smallest attention to this effect of a conveyance of debts is sufficient to convince that it cannot possibly be the intention of a creditor who consents to the sale of a part of his debtor's lands, without any part of the price being applied to his payment, to transmit his debts, because no creditor will agree to the extinction of his debts without payment. A donation, indeed, may be expressly made, but it is never presumed when not expressed,

BUCHAN
v.
COCKBURN.
1789.

and when another rational construction can be put upon the transaction.

By the conception of the disposition, the defender is a consenter only, and not a joint-disponer with Sir Alexander Cockburn and his son. He is a consenter only in the dispositive clause; he is also a consenter only in the procuratory of resignation. In none of the clauses is the defender brought in as a party who conveys, or makes over any thing to the pursuer. In two of the clauses, namely in the dispositive and procuratory, he is brought in as a consenter, not as a disponer or resigner, and in the other clauses, namely the obligation to infeft—the obligation of warrandice—the assignation to the maills and duties, and the assignation to the writs and evidents—he is not mentioned even as a consenter. Having conveyed, therefore, nothing to the pursuer, the defender is not bound to communicate the rights and diligences in his person to the pursuer.

FIRST INTERLO-
CUTOR.

July 24, 1789.

Lord Kilker-
ran's Session
Papers, MS.
Notes.

The Lords found, "That Sir William Cockburn is bound to communicate the rights and diligences in his person, to secure Mr. Buchan's purchase."

LORD KILKERRAN thus writes on the papers in the cause:—
"All agreed that a proprietor of land consenting to a disposition, granted *a non domino*, implies a conveyance by the *dominus*; but the doubt was, that as the consenter was only a creditor, whether that was any more than a *non repugnantia*, and a consent that his debts should not affect Mr. Buchan's purchase. And no doubt such would have been found to be the construction of Sir William Cockburn's consent, but for the manner in which, after reading the disposition, it appeared that Sir William had consented. For in reality the disposition in effect bears him to be joint-disponer. It carried by the President's casting vote, that it imported a conveyance."

JUDGMENT.
Dec. 12, 1789.

On a reclaiming petition by the defender, the Lords found,—
"That Sir William Cockburn not being a joint-disponer with Sir Alexander Cockburn and his son, but only a consenter to that deed, his consent imports no more but a *non repugnantia*, and that he is not bound to convey the debts and diligences in his person in favour of Mr. Buchan for the security of his pur-

chase, but only not to use them in prejudice of Mr. Buchan's purchase."

BUCHAN
v.
COCKBURN.
1789.

LORD KILKERRAN again writes :—" It appeared plain upon reconsidering the case, that Sir William was not joint-disponer, which the plurality of the Lords had apprehended Sir William to be, upon hearing the disposition read in Court at the report. But upon the supposition of his only being consenter, it came to be argued, whether every consent did not imply a conveyance. It was observed, that Stair in several places seems to say as much, and that consent is the same thing as if the consenter were resigner ; and as to the nature of a consent, it was said that if the consent of a *dominus*, one having in him the right of property, imported a conveyance, as all agreed it did, so a consent of a creditor might, for the same reason, imply a conveyance of every right in him, just as a disposition of the property from a *non dominus* will imply a conveyance of any lesser right, as of tack or annualrent, that may be in him. Arniston, in answer to this, said, that he was of opinion that a consent by one who was proprietor did imply a conveyance, yet a consent by a creditor did not ; and the reason he gave was, that the consent of the *dominus* can have no other meaning or intention, whereas the consent of a creditor not only may have another meaning, a *non repugnantia*, but indeed cannot in common sense be thought intended for any other purpose than a *non repugnantia*."

Lord Kilkerran's Session Papers, MS. Notes.

LORD ELCHIES, in his Notes, observes :—" The Lords found Sir William bound to convey his right to Mr. Buchan, in security of his purchase, by the President's casting vote ; *renit*. Arniston, &c., who, as to the effect of a consent, distinguished betwixt the consent of the proprietor and of one who is only creditor, that, in the first case, the consent would convey the consenter's right, but that, in the other, it is only a *non repugnantia*. Drummore and I thought that a consent, without more, was effectual to convey all the consenter's rights to the purchaser, and that whatever is sufficient to convey the property, will be equally effectual to convey every lesser right ; but then, here Sir William does not only consent, but is a principal disponer for all right, &c. The President and Kilkerran went into Arniston's notion of the effect of a consent, but then they thought here Sir William was a principal disponer."

Elchies' Decisions, vol. ii. p. 94.

BUCHAN
v.
COCKBURN.
1789.

“ On reconsidering this case, decided 24th July last, it seemed that Sir William was not a joint-disponer, and therefore that the question depended upon what is the effect in law of a disposition with consent of a *verus dominus*. I could not think that this imported no more than a *non repugnantia*, which could never convey property, nor even secure against the singular successors of the consenter; and if it imports a disposition in the case of a *verus dominus*, why does it not so in the case of a creditor *hypothecarius*? But as to this, I own Arniston satisfied me. He said, in the case of a *verus dominus*, or a party having or claiming the property of the subject, or even the liferent by way of locality, such a party consenting can intend nothing less than to convey that right, because he has no interest to retain it—his right of property or liferent gives him no right to affect any other estate—and therefore that consent must import more than a *non repugnantia*; but a creditor *hypothecarius*, or even a wadsetter, his meaning can be understood no more than a *non repugnantia*, for he cannot be thought to convey his debt without payment, and without conveying the debt, he cannot convey the security even on these lands, far less on other lands;—and therefore we altered the interlocutor, and found that in this case the consent imported only a *non repugnantia*, and that Sir William is not obliged to convey. We were pretty unanimous, but the President differed, and Drummor, as Ordinary, was in the Outer House.”

1. “ Craig discusseth this question, whether consent of one who is infeft, and thereby hath right, will validate the resignation of another who is not infeft, and hath no right; which he determineth in the affirmative with good reason. For, though the consent alone would not be sufficient, yet, seeing the form of the resignation is done, though in the name of him who hath no right, yet by consent of

him who hath right, here is both the substance and solemnity of the act. And it is alike as if the resignation had been by the consenter, which, I doubt not, will hold, though the consent be but adhibited in the beginning of the disposition or contract; and though the consenter doth not dispoise expressly for all right he hath, as is ordinary, for farther security, yea, if the consent be not repeated in

the procuratory of resignation, or mentioned in the instrument of resignation; for, if it be expressed generally in the entry of the disposition or contract, it reacheth to every article thereof, and all done conform thereto. Consent hath the same effect in the constitution of fees; and so the consent to an annualrent by a party having right, and infeft, was found to validate the annualrent, though the disposer was not infeft, and so did exclude a tack set by the consenter afterwards. Yet, if more persons should dispose for their several rights, without consenting one to another, if any of them be omitted out of the procuratory, or instrument of resignation, in whom truly the right standeth, nothing will be validly done, though that party be also in the disposition. And this is the reason why, when many persons dispose or resign, they do it all with one mutual consent. For thereby each of their rights doth contribute to the deed of the rest; and though some of them were omitted to be repeated in the procuratory, instrument of resignation, or infeftment following thereupon, the deed would be valid. But it is safest to repeat their consent in the resignation and infeftment."—*Stair*, 2, 11, 7.

2. "If the true vassal be consenter to the procuratory of resignation, either expressly bearing that the disposer, with consent, &c., constituted his procurators, or if he be consenter to the disposition by being expressed in the entry thereof, which is holden as extensive to the whole disposition, and so as re-

peated in the procuratory, or if otherwise he consent after the disposition or procuratory, apart, yet before the resignation made, the same will be as valid as if the consenter himself had granted the disposition or a procuratory. For the act of the disposer, though more express and amplified, is no more but his consent; and so the other consenting doth the same materially which he would do if he were disposer formerly. But if his consent be adhibited after the resignation is made, it is merely personal, and cannot have influence on the resignation which was before it. Or, if he but permit or give license to the disposer, or which is alike, if he consent that the disposer dispose, in so far as may concern the disposer's right, these will not be sufficient warrant for the resignation; but if he give warrant or consent to the resignation, it is sufficient. Neither is there necessity to distinguish whether the disposer have a colourable title or not, seeing that it is the consent of the true vassal, and the resignation as flowing from, and warranted by, that consent, which transmitteth the right."—*Stair*, 3, 2, 9.

3. The position of a party consenter differs from that of a party disposer in this, that the consent of the former has reference only to the rights vested in him at the time of consenting, but does not extend to other rights which he may subsequently acquire. These subsequent rights he is entitled to avail himself of, notwithstanding his prior consent.

The rule of law, *jus superveniens auctori accrescit successori*, does not therefore apply to a consenter, unless he has expressly bound himself in warrandice. Erskine observes, — No warrandice can be fixed by implication against a consenter whose implied obligation can only be understood to bar him from objecting to the disposition, upon any right then in his person.—*Erskine*, 2, 7, 4.

4. In the case of *FORBES v. INNES*, January 8, 1668, reported by Lord Stair, the Court sustained the plea, that a consent cannot exclude any supervenient right of the consenter, but only such rights as the consenter had at the time of the consent; and that although a right acquired by a party who disposes with absolute warrandice, accresces to his successor, it is not so in the case of a consenter whose warrandice is not found to be obligatory, farther than as to the rights in the consenter's person, at the time of his consent.

5. In the case of *STEWART v. HUTCHISON*, January 27, 1681, also reported by Lord Stair, the Court found, that the defender who had consented to a right of annualrent, was not thereby excluded from defending upon an infeftment posterior to his consent, and prior to the infeftment of the annualrenter. The ground for this judgment is thus given: "Seeing there was no prior obligation to grant that infeftment by the defender, and that the defender's consent, imported not absolute warrandice, and

therefore could not accresce to the annualrenter."

6. In the case of *MOUNSEY v. MAXWELL, &c.*, Nov. 29, 1808, a father and son granted an heritable bond of relief, in which the son conveyed in security, "All and whole his mailing of land in Smalrig, feued by the magistrates of Lochmaben to the said James Richardson, father of the said George Richardson, and disposed by him to the said George Richardson." It was not disputed that the father had never disposed the subject to his son, but it was contended that the father, who was the true owner, was a party consenting to the bond and disposition in security, and that where the *verus dominus* consents to a disposition, granted by one who assumes the character of heritable owner, the dispositive words are of equal efficacy, as if they came from the *verus dominus* himself. The Court sustained the title. LORD PRESIDENT BLAIR observed,— "As to that point, the authority of Lord Stair must rule. Two things are requisite, the dispositive act and the form. The two must concur; but where both exist, it is not material in which of the parties the right truly is. He who has not the right, disposing with consent of the other who has the right, disposes effectually. So Stair says, and such is the law of Scotland."—*Hume's Decisions*, p. 237.

7. Baron Hume observes on this decision,— "In speaking of this point, Erskine observes cautiously, B. ii., tit. 3, No. 21, that the

consent of the true owner is equivalent to a conveyance of his right, or at least, to an obligation to grant such a conveyance. In point of power and efficacy in law, these two are, however, very different things. Certainly the consenter cannot challenge a right which he has substantially acknowledged and agreed to confirm, nor can any one who represents him. But put the case, that the consenter afterwards disposes the subject to an onerous and *bonâ fide* purchaser, who does not represent him, and who is infert; and that a competition ensues between such purchaser, and the party who claims under the prior conveyance and infertment, *a non domino*, granted with consent. In these circumstances, the case seems not to be so clear against the purchaser. For the consenter, who truly has the right in his person, does no dispositive act to convey it thence, either to the donee, or to the disponent, the putative owner; and unless the property is in the disponent, it is not so obvious how his dispositive act can attach on the subject. There is wanting here that state of intimate relation to the land, and real dominion over it, which are requisite as a natural medium or channel of communication, to make his act and deed affect it. Not having a good infertment in the subject, he is in the estimation of law, not in possession of it, has no natural power over it, and he cannot therefore transfer or send it into the power of another person. Probably, how-

ever, the present case joined to Lord Stair's opinion, and that also of Kilkerran, who transiently delivers the same law, p. 279, No. 2, ought to lay this question to rest. See also an old decision to the like effect, though in the question only with a tenant, whose tack was from the consenter, 15th December, 1630. *Stirling v. Tenants.*—*Hume's Decisions*, p. 238.

8. In *SORLIE'S TRUSTEES v. GRAHAM*, Feb. 14, 1832, an objection was taken by a purchaser to a progress of titles, in respect that one of the titles was a disposition by a daughter as fiar, while her mother, who was the true fiar, consented as liferentrix, and for all right, title and interest she had in the subject. The Court held, that the purchaser was not entitled to object. LORD COREHOUSE observed—"There is an obvious defect in the progress to the shop No. 3 in the contract of sale. Miss Montgomery who disposed that shop in 1797 to Sorley and Stirling, was not in right of it. She was not even heir-apparent, but only a substitute in the destination. But her mother, who evidently was the real fiar at the date of the disposition, is a consenter, not only in the capacity of liferentrix, but for all right, title, and interest which he had in the subject; and as that consent is a virtual conveyance, or imports an obligation to convey, it affords the means of completing a title by action of constitution and adjudication and implement in the ordinary way."

The Dispositive Clause is the regulating clause of a Deed of Conveyance.

SHANKS v. KIRK-SESSION OF CERES.

Jan. 27, 1797.

NARRATIVE.

In 1728, Sir Thomas Hope of Craigiehall granted a feu-charter in favour of John Howie. The dispositive clause was in these terms :—" Gives, grants, and disposes, to and in favour of the said John Howie and Elizabeth Traill, his spouse, *in conjunct fee and liferent*, and to Thomas Howie, their son, in fee ; which failing, to the said John Howie, his heirs and assignees." The precept of sasine was in these terms :—" And there give and deliver heritable state and sasine, &c., to the said John Howie Traill and Elizabeth Traill, his spouse, *in liferent*, and to the said Thomas Howie, their son, *in fee*."

Infeftment was given upon this precept to the father and mother *in liferent*, and to the son *in fee*.

In 1734, Thomas Howie, the son, married the pursuer, and in 1737, he granted in her favour a liferent of all the subjects in which he stood infeft.

In 1744, John Howie, the father, conveyed the lands to himself and his wife in liferent, and to his other two sons, James and John Howie, equally between them in fee.

In 1779, James Howie conveyed his share in the lands to the Kirk-Session of Ceres. On the death of both John Howie the father, and Elizabeth Traill his wife, the widow of Thomas Howie, who predeceased his father, instituted an action of declarator to have her liferent right to the subjects declared in virtue of the deed granted by her husband in her favour in 1737. This deed having been reduced on the head of death-bed, the pursuer claimed her right of terce.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—When a subject is taken to a father in liferent, and to his son *nominatim* in fee, the fee is clearly vested in the son. Difficult questions have arisen where the subject is taken to a father in liferent, and his children *nascituri* in fee. The difficulty arises from the principle of law, that a fee cannot be in *pendente*. But where the fee is taken to a son *nominatim* in fee, this difficulty does not occur.

There does not appear any material discrepancy between the dispositive clause and the precept of sasine and infeftment. The terms "in conjunct fee and liferent," used in the dispositive clause, are flexible or convertible terms, not denoting any precise or definite right, but either import a liferent or a fee, as the circumstances of the case, and the subsequent parts of the deed explain their nature and meaning. Although a fee is taken to a father and mother *in conjunct fee and liferent*, and to the children *nascituri* in fee, a subsequent clause may be inserted in the deed, declaring that it is only for the father's liferent that the subject is held by him, and that the fee is held for the children.

SHANKS
v.
KIRK-SESSION
OF CRESS.
1797.

As, therefore, the terms "conjunct fee and liferent" may, according to the clauses and expressions afterwards made use of, import either a liferent or a fee, so the precept in the present case sufficiently explains the meaning of the preceding terms, and shows that the son was the fiar, and the father only the liferenter. The terms in which the precept was taken clearly demonstrate that such was the intention of the parties.

A precept of sasine is one of the most important clauses in a disposition or charter. It expressly regulates the terms and manner in which the feudal investiture is to be completed. The terms of the infeftment must be precisely in terms of the precept of sasine, which are its warrant, and must, for the security of the records, regulate the tenure of every feudal subject whatever. The pursuer is entitled to say that she trusted to the faith of the public records for the legal provision, and she cannot therefore be deprived of it without a manifest injury to the security of the records.

PLEADED FOR THE DEFENDER.—The question is,—What ought to be the rule where the dispositive clause is essentially different from the precept of sasine and the infeftment following upon it? The dispositive clause in the present case clearly conveyed the property to the father. The precept of sasine is merely the formal manner of carrying into execution what was previously declared by the dispositive clause. The latter is the warrant of the former clause. When the former goes beyond the dispositive clause, it exceeds its warrant, and therefore cannot be

ARGUMENT FOR
DEFENDER.

SHANKS
v.
KIRK-SESSION
OF CERES.
1797.

Lord Ordinary's Interlocutor, June 21, 1796.

sustained. The result of the pursuer's plea is, that one right was given by the dispositive clause, and a different right transmitted by the precept inserted in the same deed for the purpose of implementing the grant in the dispositive clause. The object of the preceding clause cannot be defeated by a subsequent one.

The Lord Ordinary found, "That the fee of the subjects in the charter granted by Sir Thomas Bruce Hope was in Thomas Howie, the son. Therefore finds the pursuer is entitled to her terce, and decerns in terms of the libel."

JUDGMENT.
Jan. 27, 1797.

The Court altered the Lord Ordinary's interlocutor, and assolizied the defenders.

OPINIONS.
MS. Notes,
Sir Ilay Campbell's Session Papers.

LORD ESKGROVE observed,—The infestment could not give a right beyond its own terms. So found in a question with creditors, where sasine was given of liferent only, although the fee was given in the dispositive clause. But in questions among heirs, the same rule won't serve. The dispositive clause there must rule. The other clauses are for execution and implement only of the disposition. The sasine will not enlarge the right as there given.

LORD JUSTICE-CLERK BRAXFIELD.—I am clear that the dispositive clause here gave the fee to the father. The precept is disconform, but could not vest a fee in the son which was not disposed to him. The sasine, as taken, was a sasine of liferent only. But the consequence of that is, that the right of fee under the disposition remained personal in the father. The son's right could be no better of that sasine.

LORD PRESIDENT CAMPBELL.—I am of the same opinion.

1. "The second thing considerable in a charter, is the dispositive clause which contains the lands that are disposed, and regularly with us the charter will give right to no lands, but what are contained in the dispositive clause,

though they be enumerated in other places of the charter."—*Sir George Mackenzie*, 2, 3, 5.

2. The dispositive clause is the regulating clause of the deed. The precept and procuratory are merely executive clauses, intro-

duced for the purpose of enabling the disponent to have his right feudalized. Accordingly when the executive clauses are disconform to the dispositive clause, the latter determines the extent of the right conveyed, and the parties who are entitled to take under the deed. Where, however, something manifestly appears omitted in the dispositive clause, and which is contained in one of the other clauses in the deed, the omission will be supplied from these clauses. Thus in the case of *SUTHERLAND v. SINCLAIR*, February 26, 1801, the dispositive clause was: "To John Sutherland, which failing to Kenneth Sutherland, which failing to Alexander Sutherland, and the heirs-male of his body." The procuratory was in favour of John Sutherland, and the heirs-male of his body; which failing to Kenneth Sutherland, and the heirs-male of his body. The Court held that the omission of the words *heirs-male of his body*, in the dispositive clause, was to be supplied from the procuratory. LORD PRESIDENT CAMPBELL has written on the pleadings:—"Pursuer's title good, as the dispositive clause is explained by the procuratory of resignation."

3. In the case of *THE EARL OF ABOYNE v. FARQUHARSON*, November 16, 1814, the grant, as stated in the *tenendas* clause, was broader than that stated in the dispositive clause. The Earl was infeft on a charter disponing to him, "Foresta de Birse." The defender was infeft upon a charter disponing certain lands, "cum

earum pendiculis et pertinentiis cum communi pastura in forestis de Birse," but in the *tenendas* clause it was declared that the lands were to be held "cum aucupationibus et venationibus per predictas terras nostras et per forestas de Brass (Birse) prenominate." The Court held, that although the immemorial privilege of hunting in the forest of Birse was alleged, yet such a right was not validly conveyed by being inserted in the *tenendas* clause only, and that it was not capable of being acquired as a part and pertinent.

4. LORD GLENLEE observed,— "The *tenendas* only explains the *dispositive* clause, and there are many things which are inherent in what is granted in it, which may naturally enough be brought into the *tenendas*, even where parts and pertinents are not contained in the dispositive clause, but that will never enable it to carry what is neither part nor pertinent nor alluded to in, nor depending upon the dispositive clause at all. When the clause of parts and pertinents is contained in the dispositive clause, then more effect may be given to the throwing into the *tenendas* of certain articles, which can naturally be considered as a necessary consequence of what was contained in the dispositive. But I do not think that the matter can be carried any farther."

5. LORD ROBERTSON observed,—"I apprehend that there is no clearer point than that in estimating the amount of the right conveyed, you must consider the dispositive clause alone. That is

the measure of the extent of the right. It is no doubt true that in the clause of *tenendas*, it is customary to throw in a great many particulars which may or may not be in the dispositive, but I apprehend that the clause of the *tenendas* will not render the right of the vassal wider than it is in the dispositive. That is a proposition that has received the assent of all writers, and I have seen no doubt thrown upon it."

6. LORD JUSTICE - CLERK BOYLE observed,—“I have considered all the authorities, and I have not been able to see that any doubt was entertained by any of our authors, that if the property was not a subject that could be carried by a clause of parts and pertinents, it is not one that can be carried by insertion in the *tenendas*. There must be dispositive words if it is not a subject that will go as part and pertinent. The privilege in question is not a pertinent of the estate, and I am clear that it is necessary to have dispositive words in order to convey so extraordinary a privilege. I know quite well that Stair gives in his Institute a perfect example of the style of a clause of *tenendas*, and that it contains in it “*cum aucupationibus et venationibus*,” as well as “*cum molendinis et multuris*,” and though it will carry the one as well as the other, yet it is only to the extent of giving the right of hunting and fowling to the fiar over his own lands, which shews that the expression is just equivalent to the clause, “*cum partibus*

et pertinentiis. It just gives what would have been carried by these words independently of any others. But that it will not give the right over another person's estate, is a conclusion which all those authors have come to.” The judgment was affirmed on appeal. April 22, 1818.

7. In *GRAHAM v. GRAHAM*, June 20, 1816, the dispositive clause was in favour of the heirs-male of the marriage; whom failing, to the heirs-male of any other marriage; whom failing, to the heirs-female of the marriage. In the procuratory of resignation, it was provided, “that the eldest son, and descendants of his body, should always succeed preferably to the younger sons and their descendants.” This provision in the procuratory altered the destination in the dispositive clause, by enabling a daughter of the eldest son of the marriage to take in preference to the next eldest son of the marriage. The Court held, that the dispositive clause was not to be controlled by the clause in the procuratory, and the judgment was affirmed on appeal. June 14, 1825.

8. In this case LORD SUCCOTH observed,—“It is needless to advert minutely to the destination in the dispositive clause, as it is perfectly clear. As to the after clause, I agree that the procuratory of resignation may be the proper part of a deed to bring in any clause that the maker chooses to insert; that he may insert a new clause there, making an entirely different destination from that which he

made in the original dispositive clause of the deed. Such a mode of alteration would be very unusual, but there is nothing in point of law to prevent a person from adopting this mode of altering his original intention. And, therefore, if I had seen clearly that this after clause had contained an express alteration in clear and unambiguous terms, I would have held myself bound to give effect to it, although certainly contradictory of the first clause. It would have been an awkward way of carrying such an intention into effect; but the clause would have been binding. If an alteration of the description to which I allude had been wished for, which is a complete destruction of the original destination clause, and a making of a new destination, care should have been taken to have had the thing done in clear and explicit words, so that there could be no doubt of what was intended. It is, I think, to such a case as the above, that the maxim as to which we have had so much argument from the Bar, and in the printed pleadings, '*posteriora derogant prioribus*,' properly applies, and if the present case had been of that description, I would have given effect here to that maxim."

9. LORD PRESIDENT HOPE observed,—“The order of succession originally agreed upon in the dispositive clause, cut off the succession as fixed by the common law. An entail upon heirs-male of a marriage in the terms of the destination in the dispositive clause of this deed, is the most usual desti-

nation in entails and contracts of marriage. To that destination both parties to the contract of marriage had consented. But I admit that it was in the power of the parties, in any after part of the deed, to modify that destination in particular instances. They might have declared, that if the estate should happen to descend to a certain son, he should hold it in fee-simple. That was competent; or any other provision and modification might have been introduced by a subsequent clause. The original destination here must stand, unless altered by a subsequent clause which is intelligible and precise. A provision appears afterwards, and if it carry the estate to the present claimant, it makes a very important alteration upon the original destination, whether the procuratory of resignation, meant merely to confirm the original destination in the dispositive clause, or intended to make an alteration on it, he does not distinctly say, and that is the question to be determined. He might have inserted in the procuratory of resignation a destination which, if clearly worded, would have utterly subverted the original destination, and we must have given effect to the destination in the procuratory; and if any person had taken the estate under the first destination, he would have been bound to denude in favour of the heir pointed out by the procuratory of resignation; but the question is, has the disponent said any thing to make us infer that his intention was to alter the ori-

ginal destination. I cannot give into the interpretation, which would suppose that a particular destination was stipulated in the first part of the deed, and then directly destroyed by the clause in the procuratory, introducing an order of succession unusual in itself, and very unreasonable in so far as the lady was concerned. The clause may be redundant according to the interpretation I give it, but mere redundancies are seen every day in deeds, and even according to the pursuer's interpretation, redundancy still attaches to the deed. I am of opinion that we ought to look upon the clause merely as redundant, and not both as redundant and inconsistent."

10. In *FORRESTER v. HUTCHISON*, July 11, 1826, the dispositive clause and the obligation to infest were in favour of the institute *and the heirs-male* of his body. The procuratory was in favour of the institute *and the heirs* of his body. LORD JUSTICE-CLERK BOYLE observed,—“The procuratory might undoubtedly have constituted the whole entail. But here we have a regular dispositive clause with an obligation to infest the heirs there mentioned; and the procuratory is for effectuating this infestment. Although, therefore, if the words in the dispositive clause had not been clear, we might have been obliged to go to the procuratory to explain them. Yet, as they are perfectly explicit, we must give effect to the destination in the dispositive clause, which is to heirs-male, and not to the heirs-general of the institute. In thus giving

effect to the dispositive clause, I wish it to be distinctly understood that I do not entertain the slightest doubt of the propriety of the decision in the case of *Urrard*, in which I concurred, but that I rather follow out the principle of it, by giving effect to the clear declaration of the entailer in the dispositive clause.”

11. In the case of *URRARD*, July 5, 1821, here referred to, the dispositive clause was in favour of the “heir-male of the marriage, and to the heirs and assignees whatsoever of the said heir-male; *whom failing*, to the heir-male of any subsequent marriage, and the heirs of his body; *whom failing*, to the heir-female of the marriage, or eldest daughter of the marriage, and *who should always succeed without division*.” It was held that the three daughters of the marriage had right to the estate as heir-portioners of their brother, and not the eldest daughter without division, and this judgment was affirmed April 8, 1824.

12. In the House of Lords, LORD GIFFORD observed,—“It is contended, that although this is *prima facie* the technical meaning of this destination, that meaning may be restricted by the context, or other parts of this instrument, if it can be clearly shewn that this party intended to use those terms in a more restricted and limited sense; and, undoubtedly, my Lords, I apprehend that this is a correct statement of the law of Scotland with respect to the construction of instruments. And, my Lords, I cannot, I think, state to your Lord-

ships so applicably, or more applicably, what the law of Scotland is as decided in their Courts; but still more, as decided by your Lordships, than by referring your Lordships to what is stated by a noble and learned Lord, the present LORD CHANCELLOR, in the great Roxburgh case, in a most luminous judgment pronounced by him upon that occasion. My Lords, he states the result of the law as laid down in a case which has been referred to, I mean the case known by the name of the Linplum case. He states, that the result of that decision was, which he considered to be most accurate in all its parts, 'that in construing a deed on which there is a question as to the true intent of the author of the deed, you are to adhere to that as the intent which is the *prima facie* obvious meaning of the words; unless you are by fair reasoning, by strong argument, by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning, and unless you can satisfy yourself that the author of the deed did not intend that such should be taken to be the meaning of the words he had used; and unless you collect, I think I may safely add that, and abstain from going further, that that is not the meaning of the language of the author of the deed, from what the

author of the deed has himself, by the deed, told you is the meaning of his language.' And, my Lords, undoubtedly in considering this case, it is my duty, and my anxious desire, to adhere to that criterion in the construction of this instrument."

13. In the LINPLUM case, the destination was to such of the younger sons of the family of Tweeddale as were then in existence, *nominatim et seriatim*, and the *heirs-male of their bodies*; whom failing, to Alexander Hay and his *lawful heirs-male*; whom failing, to the *heirs-female* of the body of John Marquis of Tweeddale. From the tenor of the deed, it appeared highly probable that the alteration of the expression "*heirs-male of the bodies*," as applied to the Tweeddale family, into "*lawful heirs-male*," as applied to Alexander Hay, was not occasioned by any difference in the intention of the granter, but had crept in through the inaccuracy or want of skill of the writer, who was not a conveyancer by profession. The Court considered themselves bound to give judgment according to the signification of the term in question, notwithstanding that the probable intention of the entailer was admitted to be contrary, and their judgment was affirmed on appeal. April 7, 1789.

A Conveyance of Land will not, per se, carry collateral rights not essential to the right of property in the land; and a general assignation of writs and evidents in a deed of conveyance, will be construed with reference to the extent of the right conveyed in the dispositive clause.

I.—GRAHAM v. DON.

Dec. 15, 1814.

NARRATIVE.

In 1636, William Earl of Glencairn obtained from William Earl of Abercorn, a tack of teinds of his lands of Finlayston, situated in the parish of Kilmalcolm. The endurance of the lease was the Earl's lifetime, and that of nine successors, and the additional period of ten times nineteen years from the death of the last successor.

In 1708, William Earl of Glencairn, the third in order from the Earl who obtained the tack of the teinds, executed an entail of the barony of Finlayston. The entail contained the following clause:—"And in like manner, I, by these presents, under the reservations above written, assign, transfer, and dispoise to and in favour of myself, whilks failing, to my heirs of tailzie and provision above written, all contracts of alienation, dispositions, &c., and all *tacks, assedations*, subtacks, prorogations, and valuations, and others whatsoever, of and concerning the said lands *and teinds thereof*, made and granted to me, my authors and predecessors, by any person or persons, with power to me and my foresaids heirs-male of tailzie and provision, to suit the benefit, implement and fulfilling of all the said writs, evidents, rights and securities, clauses of warrandice, and all other obligants therein contained in the haill heads, articles, and contents thereof; *dispensing with the generality hereof, as if every particular writ, security, or others foresaid, were herein particularly expressed and assigned.*"

In 1756, the successor of the maker of the entail purchased the titularity of the teinds of the parish of Kilmalcolm, in which the lands of Finlayston were situated. In 1780, Earl James, the succeeding heir, conveyed to trustees for behoof of his creditors his whole possessions, heritable and moveable. The act-

ing trustee thereafter exposed to sale "*All and whole the teinds, parsonage and vicarage* of the lands, barony, and others within the said parish of Kilmalcolm, so far as these teinds have not been formerly appropriated or alienated." The clause of war-randice in the articles of roup, contained the exception of "all former alienations of teinds of the lands and others, lying within the said parish of Kilmalcolm, granted by the said Earl, or his predecessors or authors, to the proprietors of land within that parish."

GRAHAM
v.
DON.
1814.

A public sale was not effected, but the Countess of Glencairn became the purchaser by private contract, referring expressly to the articles of roup.

In 1793, the succession to the estate of Finlayston opened to Robert Graham of Gartmore. A competition subsequently arose between him and Mr. Don, who had succeeded his grandmother, the Countess of Glencairn, as to the right to the tack of the teinds obtained by William Earl of Glencairn, in 1636. If the tack was included in the entail executed in 1708, then the right to it belonged to Mr. Graham, as heir of entail. If, however, it was not comprehended under the entail, then it had vested in Earl James, free from the restrictions of entail, and was so carried by the conveyance of the titularity of the teinds to the Countess of Glencairn in 1780. In 1795, a submission regarding the tack had been entered into between the Countess and her son, the then Earl of Glencairn. The pursuer brought an action of reduction of the decree-arbitral in this submission.

PLEADED FOR THE PURSUER.—The maker of the entail 1708 held a tack of the teinds of Finlayston, which he had power to assign. The question is, whether there was in the deed 1708 an effectual assignation of that tack to the heir of entail? Any tack may be effectually conveyed by a general assignation which specially expresses all tacks affecting particular lands or teinds. It is very true, that assignation does not make a complete right. In the case of lands, the assignee of a personal right does not thereby get a feudal title. In order to get a feudal title, he must adjudge in implement, or use diligence for completing the right given to him. But still the assignation is a complete transmission of the personal right, such as it formerly stood in the

ARGUMENT FOR
PURSUER.

GRAHAM
v.
DON.

1814.

cedent. In the case of moveables, the title by assignation is not complete till it is followed by possession. In the case of tacks, which are real rights by statute, but not admitting, or at any rate not requiring sasine, assignation is the proper method of conveyance, but the real right is not complete until possession follows.

The entail of 1708 is not a disposition of lands. It is a bond of tailzie followed by a procuratory of resignation, and then by a clause of general assignation and disposition. An assignation to writs and evidents is regarded by the defender as merely an appendage to the previous disposition, but neither necessary to the conveyance itself, nor effectual to operate as a conveyance. Where a party holds an estate without infeftment, it is not strictly in his power to convey the property. All he can do is to assign the personal right which he has by means of the titles on which it depends. The clause assigning writs and evidents is the proper clause for conveying personal rights. In order to carry the personal right, the party holding it conveys it by means of a clause assigning the disposition itself. By this means the granter places the assignee precisely in the same situation in which he himself formerly stood. Instead of the assignation of the titles in such a case being merely an appendage to the disposition of the lands, not necessary or material, the fact is, that the direct disposition of the lands is an encroachment upon the proper deed by which personal titles were originally assigned.

With regard to the tack of teinds in question, the clause of assignation must retain its original character. It is impossible that there can be a disposition of anything in the subject to which this tack gives title. The whole substance of the right lies in the tack itself. To dispoise the teinds is impossible, because a tack of the teinds is not a right of property in them. A tenant who wishes to transfer his lease can do nothing except assign this lease.

The clause of assignation is therefore the proper clause for the conveyance of all personal rights whatsoever, and is the only correct form in which a tack of the teinds ought to be, and is, effectually conveyed. In the present case, there can be nothing but an assignation to the personal title, the lease itself. There could

be no mention of the tack in any previous part of the deed. Neither is the clause so general as the defender maintains it to be. The lands are minutely described in the former part of the deed. The tack in question related to the teinds of the whole estate. The clause assigning the tack was thus the same in its import as if the lands had been minutely described in reference to the tack of the teinds alluded to. Farther, the clause contains a special declaration that the assignation shall be as effectual "as if every particular writ were herein particularly expressed and assigned." The clause is therefore submitted to be sufficient to carry the tack of teinds in question, and, being an effectual conveyance of the tack, it is sufficient to convey the tack under the limitations of the entail.

GRAHAM
v.
DON.
1814.

PLEADED FOR THE DEFENDER.—It is admitted that any tack, whether of lands or teinds, is lawfully carried by assignation. A general assignation also may be so framed that it will carry all tacks held by the granter. But a general mention of tacks, in the general assignation of writs and evidents subjoined to a bond of tailzie of lands, will not have that effect. In such a deed, as in any other deed effecting the conveyance of lands, the subject of conveyance in contemplation of the granter is contained in the clause particularly appropriated to that purpose. The assignation to writs and evidents is merely subsidiary. It conveys no substantive right, and is limited in its effect to the transference of such documents as are necessary to complete the right conveyed in the leading part of the deed.

ARGUMENT FOR
DEFENDER.

It can make no possible difference whether the deed be a bond of tailzie or a disposition. It is a conveyance of heritable property, and must be construed as one, of which each subordinate part or clause must receive the effect merely which such clause is understood to have for its object. In all deeds intended to effect the conveyance of land, the dispositive clause is the only part of the deed which is held to afford evidence of the substantive rights actually intended to be conveyed. The various other clauses must be construed as having reference to those substantive rights, and an assignation of the writs and evidents is only calculated to transfer the documents of which

GRAHAM
v.
DON.
1814.

the legal possession is necessary to complete or enforce the rights actually conveyed.

It is true, that the clause assigning the writs and evidents includes, "Tacks, assedations, sub-tacks, prorogations, and valuations of and concerning the said lands and teinds thereof." But this is a mere random enumeration, and cannot add anything to the usual effect of this clause.

It is not maintained that the tack of teinds in question ought to have been included in the clause, by which the various lands are resigned. The appropriate mode of acquiring or conveying such rights is by assignation. But then no effectual assignation of the tack of teinds exists in the deed. The mention of tacks in general terms, evidently inserted at random in a clause which usually conveys no separate right, cannot upon any sound principle alter the character and extend the operation of the deed to a species of right totally distinct from that which it was its primary object to convey. The pursuer's argument goes the length of destroying all distinction between a general and a particular description, because it assumes that a general description virtually describes every particular document to which the general terms can apply. He argues that an assignation of all tacks of teinds is equivalent to an assignation of the particular tacks by specific description. On the same principle he might maintain that the tacks of teinds were included under the general assignation of writs and evidents. On the same principle, also, the pursuer might claim the right of patronage which the entailer possessed by a separate charter, on the ground that it was included in the general assignation of all dispositions and charters relating to the lands.

Interlocutor
of Lord Ordinary.

LORD BALGRAY, Ordinary, sustained the claim of the heir of entail, in respect "That the entail 1708 does, by a proper and apposite dispositive clause applicable to personal rights, assign, transfer, and dispoise all tacks concerning the said lands and teinds thereof."

JUDGMENT.
Dec. 15, 1814.

The Court unanimously altered and found, "That the general clause of assignation of writs and evidents in Earl William's deed of tailzie in 1708, was not a due and sufficient conveyance of the tacks of teinds in question to the heir of tailzie."

LORD BALGRAY at the advising observed,—“ I am satisfied now that my interlocutor was wrong. I am now satisfied that if intended to be entailed, this tack must have been more specially conveyed than it is. The granter would not have been content with these general words thrown in *inter alia*.”

GRAHAM
v.
DON.
1814.

OPINIONS.
MS. Notes,
Baron Hume's
Session Papers.

II.—HORNE v. BREADALBANE'S TRUSTEES.

In 1715, John Lord Glenorchy sold “ to Francis Sinclair of Feb. 21, 1842.
Stirkoke, his heirs and successors whatsoever, the lands of Sybsterwick, with all parts, pendicles, and universal pertinents of the said lands, together with the haill parsonage teinds and teind sheaves of the said haill lands, with their pertinents, together also with all right, title, and interest, claim of right, property, and possession, as well petitory as possessory, which the said John Glenorchy had or anyways may have to the said lands, teinds, and pertinents thereof, or any part of the same in time coming.” NARRATIVE.

The disponent was taken bound to pay “ yearly for the teinds of the said lands of Sybsterwick, and pertinents thereof, to the minister serving the cure at the parish of Wick, present and to come, the sum of £29, 2s. 8d. Scots, and two bolls victual, and relieving the said John Lord Glenorchy of the stipend now agreed upon to be paid yearly to the said minister and his successor, for the teinds of the said lands hereby disponed, in all time coming.”

By the clause of warrandice, Lord Glenorchy “ bound himself, and his heirs and successors, to warrant, acquit, and defend this present right and disposition, charters, resignations, and infeftments to follow thereupon, and haill lands and others thereby disponed, with the pertinents, together with the teind-sheaves, and parsonage-teinds of the said haill lands to be good, valid, and sufficient to the said Francis Sinclair and his foresaids, heritably and irredeemably.”

Lord Glenorchy further bound himself “ to warrant, free, and relieve the said Francis Sinclair and his foresaids, of and from all future augmentation of minister's stipends and burden upon

HORNE
v.
BRADALBANE'S
TRUSTEES.
—
1842.

the teinds of the said haill lands, whether by augmentation, new erection of parishes, or additional stipends, and that as well of all years and terms bygone, as in all time coming."

In 1717, the said Francis Sinclair disposed the said lands and teinds of Sybsterwick to John Sinclair of Barrock, and assigned to him the said contract of sale 1715. The clause assigning the writs and evidents specially assigned, "As also in and to a contract of vendition passed by the said Lord John Glenorchy and me, bearing date 28th March and 20th April 1715 years, and in and to the procuratory of resignation, clause of absolute warrandice, obligation for transuming the writs relating to the said lands and haill other clauses and obligations therein contained, conceived in my favour, with all that has followed or may follow thereupon; and all these writs, particularly and generally above assigned, allenarly in so far as may concern or be extended to the said John Sinclair and his foresaids, their security of the lands, teinds, and others hereby conveyed, and haill parts, pendicles, privileges, and universal pertinents thereof hereby disposed, and no farther."

John Sinclair of Barrock was succeeded in the said lands and teinds by his eldest son Alexander, who, in 1744, was served nearest and lawful heir to him. By this service Alexander acquired right to the unexecuted procuratory of resignation in the disposition 1715, contained in the contract of sale between Lord Glenorchy and Francis Sinclair of Stirkoke, and also to the disposition 1717 by him to his father.

In 1750, in virtue of the said procuratory, he expedé a Crown charter, on which he was infeft.

He afterwards, in 1769, disposed the said lands and pertinents to his younger brother John, but this disposition was not produced. John also disposed the said lands to Thomas Dunbar of Westfield, but this disposition also was not produced.

In 1796, the lands were sold at a judicial sale to David Brodie, who, in 1797, expedé a charter of confirmation and sale, on which infeftment followed in the same year. By this charter, the disposition 1769 by Alexander Sinclair to John Sinclair, and the one by John Sinclair to Thomas Dunbar, were confirmed.

In 1818, David Brodie conveyed the lands to trustees, and

assigned them "in and to the whole writs and evidents, rights, titles, and securities of the said lands and others, made and granted in favour of me, my predecessors and authors, and whole claims therein contained, with all that is competent to follow thereupon for ever surrogating and substituting them in my full right of the premises for ever."

HORNE
S.
BREADALBANE'S
TRUSTEES.
1842.

In 1824, the said trustees conveyed the lands to the pursuer, and assigned to him "the whole writs and evidents, rights, titles, and securities of the said lands, teinds, and others, as made to and in favour of the acquirers, and their authors and predecessors, and whole claims therein contained, with all that had followed or might be competent to follow thereon."

In 1828, the pursuer, as proprietor of the lands of Sybsterwick, and as in right of the clause of warrandice in the contract 1715, brought an action against the late Marquis of Breadalbane, as representing Lord Glenorchy, concluding to have it declared that the Marquis was "bound and obliged to free and relieve the pursuer, and his lands and teinds of Sybsterwick, of all payments of stipend beyond the stipulated amount, and to have him ordained to make payment of the whole sums which he or his authors had paid over and above that amount." In defence it was pleaded, that the clause of warrandice in the contract of 1715, had not been transmitted to the pursuer, and that therefore he had no title to found upon it.

PLEADED FOR THE PURSUER.—The obligation in question WAS ARGUMENT FOR
duly transmitted from Francis Sinclair to John Sinclair of Bar- PURSUER.
rock, in 1717. The contract of 1715, is specially made over to the disponent. If, therefore, the disponent had express right to the deed of 1715, it cannot be maintained that he had no right to the obligation of warrandice against augmentations. That obligation of warrandice forms a part of the deed 1715, and is not excepted from the conveyance in 1717. The circumstance of the disponent superadding his own personal obligation of warrandice against augmentation, cannot extinguish the previous obligation of Lord Glenorchy. It was the reliance which the disponent placed upon Lord Glenorchy's obligation, as being effectual for the relief both of himself and the disponent, that induced him to superadd his own personal obligation. There is no

HORNE
v.
BREDALEBANK'S
TRUSTEES.
1842.

ground for inferring that the obligation of warrandice against augmentations undertaken by Lord Glenorchy, was excepted from the conveyance of 1717. That deed specially and *nominatim* makes over to the disponent the deed 1715, with all the clauses which it contains.

If, then, the obligation in question was carried by the disposition in 1717, the next question is, whether there is any good objection to the subsequent parts of the progress? It is true that in the subsequent transmissions, the deed of 1715 is not specially conveyed. But in each of these transmissions there is a full conveyance of the whole writs and evidents of and concerning the lands and teinds in question. A right to warrandice passes along with the subject warranted as a natural consequence thereof, either special or general. But if the disposition expressly assign to the disponent the writs and evidents relating to subjects warranted, the transmission of the warrandice is unquestionable. When a disponent divests himself of the subject warranted, he is held at the same time to divest himself of his right to sue upon the obligation of warrandice. When he divests himself of the subject warranted, the obligation of warrandice is no longer of any use to him. The disponent of the subject warranted is the only person to whom the obligation of warrandice can be of any use. The right to sue upon the warrandice accrues, therefore, as a natural consequence of the right to the subject disposed. But even if the right to an obligation of warrandice did not pass as an accessory to the subject warranted without any assignation whatever, still the right to such an obligation is effectually transmitted by a disposition to the subject warranted, containing a general assignation to writs and evidents.

The lands and teinds were conveyed by Lord Glenorchy to Francis Sinclair, his heirs and successors whatsoever. The obligation of warrandice is to relieve Francis Sinclair and his foresaids from all future augmentations of stipend. The obligation of warrandice, therefore, is granted in favour of the same persons to whom the lands and teinds were conveyed. To entitle the pursuer, therefore, to the benefit of the clause in question, it would be sufficient for him to show that he is the holder of the lands and teinds to which the obligation relates.

But the same titles which convey the lands and teinds convey also, in the most comprehensive terms, the whole writs and evidents concerning them. It is not pretended that Francis Sinclair, in 1717, when he conveyed the lands and teinds to one party, conveyed the right to the obligation in question to another party. If it is not held to be conveyed by the disposition of 1717, then it must be held that that disposition operated as a discharge of the obligation itself. But Lord Glenorchy was not a party to the disposition, and the disposition contains no expression which can possibly be construed into an intention on the part of the disponent to liberate Lord Glenorchy from that obligation.

HORNE
v.
BRENDALBANK'S
TRUSTEES.
1842.

It is said that the obligation in question is a mere personal obligation, and that a general assignation of writs and evidents would not carry a personal obligation for a sum of money not having reference to the particular lands and teinds conveyed. But the obligation of warrandice in question has most express reference to the lands and teinds conveyed. The case, therefore, of an obligation for a sum of money quite distinct from the conveyance of the lands and teinds, is not a case in point. The present case is one of warrandice, and it is submitted that an obligation of warrandice must be held to be conveyed along with the subject warranted, more especially where the disposition contains an assignation of the whole writs and evidents relative to the subject conveyed.

PLEADED FOR THE DEFENDER.—The contract of 1715 is mentioned in the progress of titles in one instance only. That instance occurs in the disposition 1717, by Francis Sinclair to John Sinclair. The warrandice by Lord Glenorchy against augmentation of stipend is not expressly assigned, and there is express warrandice against such augmentation by Francis Sinclair, Lord Glenorchy's disponent. The want of a special conveyance of that warrandice is of itself fatal to its transmission. It is admitted that the contract of 1715 was assigned, but the inference deduced from this, that the obligation of warrandice in question was therefore assigned, is unsound. The obligation of warrandice is a mere personal obligation on the granter of it. It relates to certain lands, but it does not form a necessary

ARGUMENT FOR
DEFENDER.

HORNE
v.
BREEDALSANE'S
TRUSTEES.
1842.

part of the title to these lands. It might have been constituted separately from the disposition of the lands. It is not an ordinary but a most unusual provision, because a personal obligation is undertaken to relieve the disponent from a portion of those burdens to which the lands and teinds were by law subject. The assignation of the contract 1715, conveys to the disponent those parts of that deed which were necessary to complete his feudal interest. The usual warrandice of the lands against burdens anterior to the entry would also be carried by it.

An assignation of writs is subservient to the main object of the conveyance in which it is found. The object of the disposition of 1717, was to give to the disponent a right to the lands conveyed. The object of the relative assignation of the contract 1715, was to vest in the disponent the unexecuted procuratory of resignation contained in that deed, whereby the right disposed to him might be feudalized. Anything beyond this was out of the ordinary scope of such an instrument; and the presumption of law is, that only the usual provisions necessary to support the right conveyed in the dispositive clause are carried by the common assigning words of conveyancing. This presumption can be elided only by expressly specifying the extraordinary right intended to be carried.

The contract of 1715, is not mentioned in the subsequent part of the progress of the title. The contract itself not being mentioned, the personal obligation of warrandice in question, and which formed no part of the title to the lands, cannot be held to be conveyed. This being the case, the common clause of style as to writs and evidents cannot be held to be sufficient to transmit the personal obligation of warrandice contained in the contract of 1715. That clause is subordinate to the dispositive part of the deed. It carries only what has reference to that part, what is necessary for the completion or defence of the right given by that clause. It does not and cannot carry peculiar and unusual provisions not connected with the feudal right conveyed.

The obligation in question is personal, and has no proper connexion with the title to the lands. It is an obligation for money, contingent as to time and amount on the amount of stipend allo-

cated on the pursuer's lands and teinds. But it does not relate to these lands and teinds themselves. One party becomes bound to pay another the amount of any charges to be imposed upon his lands. This is merely a personal obligation for money. Its nature is not altered by its being made with reference to lands, or even by its being included in the title of the lands. That does not make it partake more of *real* qualities than it did at first, and does not constitute it any part of the title of the estate.

HORNE
v.
BREEDALBANK'S
TRUSTEES.
1842.

If a personal obligation for money had been constituted in the contract of 1715, not bearing to be granted in reference to the lands or teinds conveyed, a general assignation of the writs and evidents would not pass that obligation. The reason of this is, that the subject of the disposition to which the assignation was subsidiary, was the lands, and the lands only. The affirmative of this proposition must be maintained by the pursuer, otherwise he must relinquish the personal obligation in question.

LORD MACKENZIE, Ordinary, sustained the title of the pursuer, and found "That the defender was bound to relieve the pursuer, and his lands and teinds of Sybster, of all payments of stipend beyond the amounts of £29, 2s. 8d. Scots money, and two bolls victual."

Interlocutor of
Lord Ordinary,
Nov. 12, 1833.

The defender having reclaimed, the Court pronounced the following interlocutor:—"The Lords having advised the cause, and heard counsel for the parties; adhere to the interlocutor of the Lord Ordinary submitted to review, in so far as to find, that the obligation of warrandice in the contract of 1715 libelled upon, is effectual to relieve from all future augmentations of stipend, and that it has been duly transmitted to the pursuer: Therefore, and to this effect, sustain the pursuer's title, and decern."

JUDGMENT.
Feb. 20, 1834.

This judgment having been appealed—It was "Ordered and adjudged, that the case be remitted back to the said Second Division of the Court of Session in Scotland, to consider and state their opinion how far the obligation of warrandice, under the contract of 1715, mentioned in the Appeals, has been duly transmitted to the pursuer; and this House does not think fit to pronounce any judgment upon the said Appeals, until the said Second Division of the Court of Session shall have given

REMIT.
Journals of the
House of Lords.
May 7, 1840.

HORNE
BREADALBANE'S
TRUSTEES.

their opinion upon the matter hereby referred to their consideration, according to the direction of this order."

1842.
JUDGMENT ON
REMIT,
Jan. 23, 1841.

Cases were ordered on the questions contained in the remit ; and the following interlocutor was thereafter pronounced :—
" The Lords having resumed consideration of the petition of William Horne, Esq. of Scouthel, to apply the remit from the House of Lords in the Appeal of the trustees and executors of the deceased John Marquis of Breadalbane, and in the cross appeal of the said William Horne, dated May 7, 1840, with revised cases for the parties formerly ordered, and having special regard to the terms of the foresaid remit, requiring this Court—' To consider and state their opinion how far the obligation of warrandice, under the contract of 1715, mentioned in the Appeals, has been duly transmitted to the pursuer, the foresaid William Horne,' state and declare their opinion as follows ; namely,— That the obligation of warrandice expressed in the said contract of date the 28th day of March 1715, in so far as the same relates to the lands called Sybsterwick, or Subbuster, and the teinds thereof ; which lands and teinds, together with the said contract, and all the obligations therein expressed, were conveyed by disposition of date the 6th day of February 1717, by Francis Sinclair to John Sinclair, has been duly transmitted by the several conveyances set forth in the record and the revised cases for the parties, to the pursuer, the said William Horne. But that the said obligation of warrandice in the said contract of 1715, in so far as the same relates, or purports to relate, to the lands called Wedderclett and Hauster, and the teinds thereof ; which lands and teinds were, by the said Francis Sinclair, by a disposition bearing date the 18th day of May 1710, disposed to George Sinclair, has not, by virtue of the deeds and documents, founded on in this process, been duly transmitted to the pursuer, the said William Horne."

OPINIONS.

LORD MONCREIFF observed,—“ I think that there was ground for the remit. The point even as to Sybsterwick is not so clear to my mind as it seems to have been thought. But as to the other lands, I think it more than doubtful. As to Sybsterwick, I think, on the whole, that the right in Lord Breadalbane's special warrandice has been effectually transmitted to Mr. Horne. We must hold the obligation itself to be clear. It is in the

contract of 1715, which conveys the lands and teinds of Sybsterwick to Francis Sinclair. It includes the lands and teinds of Wedderclett and Hauster. But lay that aside at present. By the disposition 1717, Francis Sinclair conveyed Sybsterwick, with the teinds, to John Sinclair of Barrock. The transmission of the special obligation of warrandice to Barrock does not depend on general clauses of writs and evidents. It is in express words assigned, as held by the contract 1715, previously executed. True, there is a qualification, 'in so far as the writs may extend to the disponent's security of the lands and teinds conveyed, hail parts, pendicles, privileges, and universal pertinents thereof.' I admit that it is a fair question, whether this restrains the use to be made of the writs assigned, to the support of the conveyance of the heritable right to the teinds. And, to be sure, the special warrandice against augmentations of stipend is not necessary to that effect, but quite a distinct thing. But then the deed 1717, in specially assigning the contract 1715, and the procuratory, does so with all the obligations contained therein; and it cannot be doubted that the obligation of relief from augmentations was one of the privileges and pertinents of the teinds, which then stood in the person of Francis. To suppose that in specially conveying such a contract and procuratory, he did not assign the obligation distinctly expressed in both, for securing the freedom of the lands and teinds from future augmentations, would, in my apprehension, be to nullify the express assignment of the contract altogether, and to go against the plain meaning of the deed 1717. Therefore, I think it clear, that the right was effectually assigned to John Sinclair; and I do not understand that the House of Lords doubted this. I should not think it at all conclusive that Francis Sinclair bound himself in a similar warrandice. That may cut both ways. He might hold the obligation for his own relief, while, without assigning it, he bound himself.

"The more difficult question is, whether the right has been transmitted from Francis, through the intermediate parties, to Mr. Horne? I incline to think that it has. The title to this contract 1715 being once vested in John Sinclair by express conveyance in 1717, I think that it constituted one of the title-deeds of the lands and teinds, as they stood in him; and so

HORNE
v.
BREEDALBANE'S
TRUSTEES.
1842.

HORNE
v.
BREEDALBANE'S
TRUSTEES.
1842.

that, according to the doctrine of Erskine, it must be held to have passed at least by the general clause of assignation of writs and evidents, in the subsequent dispositions. That passage, no doubt, relates generally to clauses of warrandice of the title of property of subjects conveyed. But once it is held, that this right of relief for the protection of the lands and teinds against eviction of the fruits thereof, by augmentation of stipend to the minister, was vested in John Sinclair, it seems to follow, that the conveyance by him of the lands and teinds, with all pertinents and privileges, as I must presume, though the deeds should have been produced, and all the subsequent transmissions, carried that contract 1715, and all the obligations therein expressed, by virtue of that conveyance, and the general assignment of the writs and evidents for the support and protection thereof.

"The case of *Graham v. Don*, Dec. 15, 1814, is the material authority against this. But I am inclined to think that there is a distinction, though I feel it to be narrower and more difficult than the pursuer argues. A tack of teinds is a separate title of property from an heritable right; and, therefore, as Lord Glenlee explained, in the case of *Anstruther*, it was held in *Graham's* case not to pass in a question of entail, by a general conveyance of writs and evidents intended for the support of a different title. I certainly hold an obligation of warrandice against future augmentations to be in itself a separate right from the right to teinds. But as, from its nature, it can only be useful to the proprietor of the lands or the teinds, I think that, when it does stand vested in the disponent of the lands and teinds at the date of a sale, it must be considered as one of the pertinents or privileges thereof, and therefore may be presumed to pass by the general assignment of writs for the support of the whole title."

JUDGMENT.
Journals of the
House of Lords,
Feb. 21, 1842.

The case then returned to the House of Lords, when it was "Ordered and adjudged, That the interlocutor, in so far as complained of in the original Appeal, be reversed: That the defences stating objections to the title of the respondent in the said original Appeal be sustained: And that the action to which the Appeals relate, be dismissed, with costs."

OPINIONS.

LORD COTTENHAM observed,—“My Lords, when this case was

before your Lordships in the year 1840, I then stated, that as to two of the parcels of which the estate consisted, I considered that what had been urged was quite conclusive; namely, that the pursuer, with respect to those two portions of the estate, had clearly not a right to connect himself with the warrandice so as to sue for those portions of the estate; and I am represented to have said, which I have no doubt is correct, 'what Sir William Follett has stated, disposed of two of the estates, Wedderclett and Houser; and, regarding Sybster, the pursuer must shew that he is entitled to the benefit of the covenant of 1715, by being assigned into it.' I then stated, that I did not see from the deeds printed, that he had been so assigned to it.

HORNE
v.
BREEDALBAKE'S
TRUSTEES.
1842.

"Under these circumstances, my Lords, entertaining and expressing a very clear opinion as to two portions of the estate, and being without any information as to the third portion of the estate, so as to see in what manner the pursuer connected himself with the relief which he sought, a remit was made to the Court of Session, and that remit was for the Court of Session 'to consider and state their opinion how far the obligation of warrandice, under the contract of 1715, mentioned in the appeals, has been duly transmitted to the pursuer.'

"When the case came before the Court of Session upon this point, the matter being sent without any distinction as to the different parcels, they having in the first instance been of opinion that the pursuer was entitled to the remedies he claimed as to all three portions of the estate, it appears to have been ultimately the unanimous opinion of all the learned Judges, (the Lord Justice-Clerk, having, in the first instance, stated a contrary opinion, but afterwards yielding to the arguments of the other Judges,) that as to those two portions of the estate upon which this House was satisfied upon the argument of the case when it was before them, there was no title whatever in the pursuer to raise the question as to the warrandice. The third remained for their consideration, and with respect to the third, the opinion of the Court of Session was, that the pursuer had succeeded in so connecting himself with the warrandice, as to entitle him to sue upon it, and that the defenders were liable upon it.

"Upon that latter part of the case, therefore, it now comes

HORNE
v.
BREEDALBANE'S
TRUSTEES.
1842.

under your Lordships' consideration. For though the question has again been raised at the bar, with respect to the other two portions of the estate, I have seen nothing whatever to alter the opinion which I submitted to your Lordships before, that the pursuer's case has entirely failed with respect to those two portions of the estate. That impression certainly is strengthened by the unanimous opinion of the Court below, that that was the right construction to be put upon the transaction, with respect to those two portions of the estate.

"When the case came before the Court of Session again, upon that portion of the estate upon which they reported, that they thought the pursuer was entitled to the benefit of this warrandice, it appeared, that there had been no document whatever produced to the Court at the original hearing affecting the pursuer's title at all; and I will refer your Lordships to the statement upon the summons, that it may be seen in what way it was that the pursuer stated his case, as to the mode in which his title had been communicated to him. He stated, 'that the said John Sinclair of Barrock was succeeded in the said lands and teinds of Sybster,'—that is the portion of the estate now in question,—'by his eldest son, Alexander Sinclair of Barrock, who afterwards disposed them to his younger brother, John Sinclair of Sybster. That the said John Sinclair of Sybster, in 1769, disposed them with the writs and evidents, and whole tenor and effect thereof, to Thomas Dunbar of Westfield.' Through Thomas Dunbar, the pursuer claims. With respect, therefore, to the transmission of that property from Alexander to John, the statement is merely, that Alexander afterwards disposed it to his younger brother John, and that John afterwards disposed it to Dunbar. Then the transmission from Alexander to John, is merely stated as a transmission of the estate.

"When the case came to be investigated in the Court of Session, up to the moment the learned Judges delivered their opinion, no document whatever had been produced. It did not appear in what manner, by what instrument, by what means, the title to the property had been transmitted from Alexander to John, or from John to Dunbar; and the opinions of the learned Judges were pronounced in the absence of any such

documents. Before, however, the interlocutor was finally pronounced, it was suggested, that the deeds themselves had not been produced, and the pursuer was undoubtedly treated with every possible indulgence, so as to give him every opportunity that he possibly could have, for making good his case, if case he had to make good; because, in that stage of the proceeding, the farther consideration was stayed in order to enable him to produce the instruments under which he claimed.

HORNE
v.
BRENDALBANE'S
TRUSTEES.
1842.

“The party claimed the production particularly of a disposition by Alexander Sinclair to John Sinclair, dated the 22d of August, 1769, and a disposition by John Sinclair to Thomas Dunbar, of the 6th of December, 1768. Those two deeds, supposing that this warrandice had been properly communicated to Alexander, would have shewn the mode in which it had passed from Alexander to John Sinclair, and from John Sinclair to Dunbar. But, my Lords, those documents were not produced, and nothing was produced but an instrument of sasine, corresponding with these transactions as to the transfer of the property from one to the other, the instrument of sasine being totally silent as to this warrandice, taking no notice of it whatever, and professing to be merely a transfer of the land and teinds, with the parts, pendicles, and appurtenances to the said land whatsoever.

“The question then will be, and the only question now for the consideration of your Lordships, whether, in that state of the evidence of the pursuer's title, it is possible to consider that he has made out his right, not as against the defender, to the benefit of this warrandice, which was the question discussed in the Court below, in the first instance; but the preliminary question which is to be decided, is, whether he has so connected himself with the warrandice, or contract rather,—for warrandice appears to me to be a term very inappropriately applied to the subject-matter of the present discussion,—whether he has so connected himself with this contract as to entitle him to sue upon it.

“The attempt at the bar was, to shew the mere possession of the lands carried with it a right to the benefit of this contract. Now if your Lordships call to mind what the nature of this contract is, and what right it is that the plaintiff claims in re-

HORNE
v.
BREEDALBANK'S
TRUSTEES.
1842.

spect of this contract, I think your Lordships will be of opinion, that it is a very different thing indeed from what is ordinarily understood by the term 'warrandice,' or 'warranty' according to the term used in the English law. It is a sale by one party to another of the teinds or tithes of the parish ; according to the law of Scotland, that being a property in individuals, but always subject to be diminished by a portion of it being assigned by the legitimate authority, to the support of the minister of the parish—not as in this country, where the minister of the parish has the whole tithes—but the tithes being in the hands of individuals subject only to have a portion of them taken by the competent authority for the purpose of increasing the stipend of the minister. What, therefore, the one purchases from the other, is the teinds of the parish ; the teinds of that parish being, like all other teinds, subject to this liability to be diminished in the hands of the individual, by being taken for the purpose of adding to the stipend of the minister. But the title to the teinds is not affected by the augmentation ; the enjoyment of them is diminished, by a part of them being taken by legitimate authority for that purpose. But there may be a perfectly good title to the teinds ; the title may be free from all objection, although a large portion, or the whole, may be taken for the purpose of being added to the minister's stipend.

"The nature of this contract was this,—The party selling says, I sell you the teinds of this parish ; the minister's stipend is now a certain amount, and I enter into a contract with you to indemnify you in the event of the minister's stipend being increased, so that the subject-matter of your purchase shall be thereby diminished. In that event, and under those circumstances, I will then undertake to repay to you, that which you may be compelled to pay out of your teinds to the minister of the parish. What connexion has that with warrandice in the ordinary sense of the term ? It is a contract perfectly collateral to the subject-matter of the sale. It is a contract that, in a particular event happening to diminish the value of the property sold, the vender shall come in and indemnify the purchaser against the diminution of income sustained by the exercise of that legitimate authority, by which, part of the income arising from the teinds may be applied to the support of the minister.

"That such a contract may be the subject of assignation, and may be passed from one hand to another, is not now in dispute. The question now in discussion is, whether the mere title to the lands, the mere circumstance of proving that the individual now instituting the suit, and prosecuting this claim, is in possession of the estate, necessarily carries with it a title to sue upon this contract.

HORNE
v.
BREADALBANE'S
TRUSTEES.
1842.

"One great difficulty in the way of the pursuer undoubtedly is, that in supporting the decision of the Court below, he necessarily must, upon this point, throw over the reasoning of all the Judges, for they, one and all, maintain the title of the pursuer, not upon the ground of his being in possession of the lands, not because he has a title to the lands out of which the teinds are to arise, but upon the ground of there being evidence of this particular contract having been assigned to the pursuer, and that he connects himself by various transfers of the property, or transfers of the contract, with the title of the individual purchaser with whom the contract was entered into.

"The authorities cited, particularly in the judgment of Lord Moncreiff, which it is quite unnecessary for me therefore now to repeat to your Lordships, shew to demonstration, that, according to the law of Scotland, the right to the benefit of contracts of this sort cannot be so appended to the title to the land, as to be the subject-matter of a suit merely in respect of the possession of the land.

"Then comes the question, if it requires a particular assignation of the benefit of this contract, what evidence have we of any such assignation? Upon this there is a total absence of all evidence. Those two deeds, if produced, might have contained evidence of such assignation, or, what is much more probable, from their not having been produced, they might have contained conclusive evidence that no such assignation was intended. What their contents may be we know not. They have not been produced, and if it is necessary for the pursuer to shew an assignation of this contract, he has not produced any document in which it is contained. Unless, therefore, it belongs to the land, passes with the land, and is necessarily available for the benefit of whoever may be in possession of the land, (an opinion which I apprehend your Lordships will not

HORNE
v.
BREADALBANE'S
TRUSTEES.
1842.

entertain,) then all the authorities and all the judges who have decided this case are against the title of the pursuer to the relief he prays.

“After having fully considered this case, and the reasons of the learned Judges, and the evidence adduced, I have not been able to find any evidence upon which it is possible to adjudicate in favour of the pursuer's right to sue upon this contract. The result, therefore, in my opinion is, that the pursuer has entirely failed to connect himself with this contract, and the question as to the nature of the contract, therefore, cannot arise. After the various opportunities which have been given to the pursuer to make out his case, with full notice of what was required, he has entirely failed to do so; and what I should submit to your Lordships, therefore, would be, that your Lordships should now reverse the judgment of the Court below—that instead of decreeing in favour of the pursuer, your Lordships should find that the defences are sustained. The party has instituted proceedings upon an alleged title, which title he has entirely failed to establish. I submit to your Lordships, that the judgment should be in favour of the defender in that suit, with the costs of the suit.”

III.—SINCLAIR v. MARQUIS OF BREADALBANE.

Aug. 14, 1846.
NARRATIVE.

In 1691, by a contract of sale, John Earl of Breadalbane, with consent of John Lord Glenorchy, his son, disposed to James Sinclair, and his heirs-male; whom failing, his heirs whatsoever, and their assignees, the lands of Lybster, with the parsonage, teinds, and pertinents of these lands. The contract contained an obligation to infest the disponent in the said lands, teinds, and others, and for that effect to grant a valid and sufficient charter, containing precept of sasine, with ample and absolute warrandice in manner therein mentioned.

The contract also contained the following clause:—“Which charter and infestment shall bear and contain this absolute and ample clause of warrandice following: Like as now as if the

said charter and infeftment were already passed and expedé ; and then as now, the said noble Earl, John Earl of Breadalbane and John Lord Glenorchy, his son, bind and oblige them, conjunctly and severally, their heirs and successors, to warrant, acquit, and defend the present right and disposition charter and infeftment to follow hereupon ; lands, *teinds*, and *others above disposed*, to be sufficient, free, safe, and sure to the said James Sinclair and his foresaids, from all and sundry wards, reliefs, non-entries, &c., bygone stents, *taxations*, *impositions*, *teinds*, *duties*, *ministers' stipends*, and *augmentations thereof*, and generally from all other perils, burdens, dangers, incumbrances, and grounds of eviction whatever, as well named as not named, excepting as is above, and after excepted, &c. Declaring always, that the *teind duties*, *ministers' stipends*, and *augmentations thereof*, are nowise understood to be comprehended under the said exception ; but the said Earl and Lord, and their foresaids, are to relieve the said James Sinclair of the same, as well in all time coming, as for bygone, as in manner above expressed."

SINCLAIR
v.
BREADALBANE.
1846.

In implement of this contract, and of the same date, Lord Breadalbane granted a charter of the lands to James Sinclair, " ejusq. heredibus masculis, quibus deficientibus heredibus ejusq. quibuscunque eorumq. assignatis." This charter contained the following clause :—" Et similiter *per præsentis* specialiter providetur et declaratur quod quocunq. jure seu titulo predictus Jacobus Sinclair sui que predict. fruentur et possidebunt predictas terras decimas aliaq. supra disposit. ; attamen semper tenebuntur et obligabuntur, sicuti per acceptationem presentis nostræ cartæ se suosq. obligant. *terras aliaq. supra recitat.* nunc et omni tempore futuro tenere frui et possidere modo et cum et sub provisionibus et conditionibus inter nos *nunc* conventis solummodo, secundum tenorem prædicti contractus alienationis et *præsentis nostræ cartæ* desuper sequen. in omnibus punctis et non aliter."

The clause of warrandice in the charter was in these terms :—" Et nos vero dicti Joannes Comes de Breadalbane et Joannes Dominus de Glenorchie unanimo consensu nos nostrosq. hæredes et successores predict. *terras decimas aliaq. supra mentionat.* cum pertinen. prefato Jacobo Sinclair ejusq. antedict. in omni-

SINCLAIR
 &
 BREADALBANE.
 1846.

bus et per omnia, forma pariter et effectum, ut premissum est, secundum tenorem dictæ dispositionis seu alienationis contractus cum reservatione et exceptione predict. contractus impignorationis supra mentionat. et cum et sub cæteris provisionibus et conditionibus inibi content. contra omnes mortales, warrandizare et in perpetuam defendere obligamus et astringimus." And the precept of seisin directed infestment to be given, "secundum formam et tenorem presentis nostræ cartæ et cum et sub conditionibus exceptionibus provisionibus et qualificationibus inibi content."

On this charter James Sinclair was infest. In 1719, Lord Breadalbane conveyed the superiority of the lands to Mr. Sinclair of Ulbster, from whom it passed to Captain Gunn of Braemore, and, at a subsequent date, came by purchase into the hands of Sir Robert Anstruther of Balcaskie.

The first transmission of the lands since the infestment of James Sinclair, was in favour of his grandson, Alexander Sinclair, who was infest by precept of *clare constat* from the then superior, Captain Gunn. This precept made reference to the charter and precept of 1691, and declared expressly that the lands and others should be possessed in all time coming according to the tenor of the said charter and contract in all points, and not otherwise.

In 1774, Captain Patrick Sinclair, the eldest son of Alexander Sinclair, was infest in the lands and teinds on a disposition granted by his father. The disposition contained an assignation to the "whole writs and evidents, rights, titles, and securities, both old and new, made, granted, and conceived in favour of me, my authors and predecessors, of and concerning the lands and others above disposed." It did not, however, mention the charter or contract of 1691, nor did it contain an express assignation to the obligation of relief from stipend and augmentations contained in the first of these deeds.

In 1821, the pursuer, as heir to his father, Captain Patrick Sinclair, obtained from the superior a charter of confirmation of the disposition granted by his grandfather, and precept of *clare constat* in favour of himself. In this charter of confirmation, the charter and contract of 1691 were expressly referred to, and it was declared that the lands and teinds should be held under that charter and contract in all points, and not otherwise.

In 1836, the pursuer brought an action against the defender, as representing the granters of the contract and charter of 1691, and concluding, "that he should free and relieve the pursuer and his lands of all teind duties, ministers' stipend, and augmentations in all time coming, and should repay what the pursuer and his ancestors may have paid in that same." The summons libelled that the pursuer was heritable proprietor of the lands and teinds of Lybster. In defence, it was pleaded, that the pursuer had not produced a sufficient title to enable him to found a claim of relief on the clauses of the contract libelled.

SINCLAIR
v.
BREXADALBANE.
1846.

PLEADED FOR THE PURSUER.—The pursuer is the direct heir-male, by lineal descent, of James Sinclair, the disponee under the contract, and the receiver of the charter. The rights under these deeds were granted to James Sinclair and his heirs-male, whom failing, to his heirs whatsoever. Whatever be the precise technical nature of the obligation in question, it is accessory to the right to the estate and teinds conveyed to James Sinclair. It is a proper obligation of warrandice created by the contract, and imported into the charter.

ARGUMENT FOR
PURSUER.

But even if it were not a proper obligation of warrandice, but a collateral obligation of relief, it is still accessory to the right to the estate, and was so received and held by James Sinclair for himself and his heirs. The pursuer, as his heir, has now right to the accessory obligation, and as the proprietor of the estate has the only interest to enforce the obligation. The contract and charter form the foundation of the pursuer's title. He holds these titles as heir, not as a singular successor, and whatever right James Sinclair took under these deeds, is now vested in the pursuer. In each of the precepts of *clare constat* which formed the links of the pursuer's title, express reference is made to the contract of sale; and although the disposition of 1774 does not refer to the contract, it contains a general assignation of writs which will embrace the contract.

The pursuer, therefore, as proprietor of the estate of Lybster, with the teinds thereof, on a progress of titles proceeding on the charter and contract of 1691, and as heir-male and repre-

SINCLAIR
v.
BREEDALBANK. sentative of James Sinclair, the original disponee, is now in
the right of the obligation of warrandice and relief.

1846.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—In a sale of lands, a seller, besides giving warrandice of the titles to the lands, may come under obligations to the disponee as to other rights connected with or dependent on the lands, or the title to them. The disponee, in addition to receiving a title to the lands, and warrandice of it, may stipulate for other collateral obligations connected with the subject conveyed. But such an obligation is not warrandice. The validity of such an obligation is unquestionable. But the question is,—Was such an obligation in the present case transmitted to the pursuer?

An obligation of warrandice of a sale of lands or teinds passes with the title to the lands or teinds. A party who has a good title to these, has, by virtue of that title, a right to sue on the obligation of warrandice. An obligation of relief against augmentation of stipend is not an obligation of warrandice. It is a collateral obligation, and therefore cannot pass as part of the title to the lands. It is a separate and substantive right. It must therefore be specially transmitted in the way in which such rights are conveyed, either *inter vivos*, or from the dead to the living, as the case may require.

The precept of *clare constat* in favour of Alexander Sinclair was strictly of a feudal character. It ascertained the character of heir, and was simply a warrant for infesting the party in the lands and teinds, but it did not give an active title in regard to any other subject. It could not give a title to the personal obligation, nor operate as a transference of it in any way. If, however, the precept did not transfer the obligation to Alexander Sinclair, there was no other title to which a right in him to the obligation could be ascribed so as to make it transmissible by him. The disposition by Alexander to Patrick Sinclair in 1774, is silent as to this obligation. All that is conveyed are the lands and teinds as described in the precept, but neither the contract nor charter are referred to. The assignation to writs and evidents of and concerning the lands and others above disposed, is insufficient for transmitting the obligation in question. The only remaining link in the title is the charter

of confirmation and precept of *clare constat* in favour of the pursuer, but this was merely a renewal of the investiture of the lands and teinds in the person of the pursuer, as it had stood previously in Alexander and Patrick Sinclair.

SINCLAIR
v.
BREDALEBANE.
1846.

LORD WOOD, Ordinary, reported the case to the Court, and stated as a ground for doing so, "that the parties were at variance in regard to what is to be held to have been settled in point of law, by the case of Maitland *v.* Horne, as decided in the House of Lords, and its bearing upon the question of the sufficiency of the pursuer's title as supported by him."

REPORT of
LORD ORDINARY.

In a Note, LORD WOOD also observed,—“ With regard, again, to the nature and character of the obligation or contract, the Lord Ordinary conceives, that, in conformity to the views upon which the case of Horne was decided in the House of Lords, it cannot be considered as an obligation of warrandice, in the proper sense of that term, and subject to the rules of transmission applicable to warrandice. Warrandice has relation to the title of the subject disposed, and which title is not affected by stipend or augmentations burdening the teinds. An obligation or contract to free and relieve from these burdens by the vender coming in to indemnify the purchaser and his heirs, by repaying that which he or they may be compelled to pay out of the teinds to the minister of the parish, (which is the obligation now in question,) has, therefore, no connexion with warrandice in its proper sense. ‘ It is,’ to use the words of Lord Cottenham, when the judgment in Horne’s case was pronounced, ‘ a contract perfectly collateral to the subject-matter of the sale. It is a contract that, in a peculiar event happening to diminish the value of the property sold, the vender shall come in and indemnify the pursuer against the diminution of the income sustained by the exercise of that legitimate authority, by which part of the income arising from the teinds may be applied to the support of the minister.’

NOTE of LORD
ORDINARY.

“ The obligation or contract, therefore, is to be viewed and dealt with, not as one of warrandice, but as a separate personal contract superadded to it,—a contract, the obligation undertaken by which may be passed from one hand to another, but with which the party suing on it must show that he has regularly connected himself. And the question here, therefore,

SINCLAIR
v.
BREADALBANE.
1846.

comes to be,—whether the contract has been transmitted downwards to the pursuer from James Sinclair, in whose favour it was made by the contract of vendition 1691, and to whom the charter, of same date, into which it was imported, was granted.

“ Upon the authority of Horne’s case, the Lord Ordinary thinks it clear, that the mere fact of the pursuer being the proprietor of the lands and teinds of Lybster is not sufficient to prove that he has a title to maintain the present action, founded, as it is, upon the contract above referred to. It is not a contract or covenant which runs with the lands and teinds, or which can be so appended to the title as to be the subject-matter of a suit merely in respect of the possession of the lands and teinds. The pursuer may, therefore, be proprietor of both without the contract having been duly transmitted to him. It is consequently necessary to consider whether, by the charter which he holds, or through the medium of any title made up by him, and those by whom he is connected with James Sinclair, the contract has passed to him so as to enable him competently to sue upon it.

“ It is stated by the pursuer, that the charter 1691, into which the contract of relief was imported from the contract of vendition, is granted to James Sinclair and his heirs-male, whom failing, his heirs whatsoever ; that the pursuer is the heir-male of James Sinclair, possessing the estate on this title, and representing James Sinclair in all rights vested in him by the charter, and transmissible from him by succession ; and that the estate, with all its pertinents and relative rights, has descended from father to son until it has reached the pursuer, whose title is built on the foundation of the charter and contract of 1691. And he maintains that, whatever might have been the decision to be pronounced—following the precedent in Horne’s case—had he been a singular successor, he, as heir, is in a different position, and that, holding that charter, he is in full right of the contract in question, *that* contract having passed or been transferred to him as such. If this plea were well founded, the contract must, in the first instance, have passed to Alexander Sinclair, who was the immediate heir of James ; then to Patrick Sinclair, as the heir of Alexander ; and then to the pursuer as

his heir and the heir-male of James Sinclair, and this independently altogether of the titles by which those parties held the lands and teinds. For the plea, as the Lord Ordinary understands it, does not rest upon the titles which were completed, as being themselves the means or form by which the contract was transmitted from heir to heir, till it finally came into the person of the pursuer ; but goes on this view, that in virtue of the titles, as made up by himself and his predecessors, (one of which it will be observed, was a disposition by Alexander Sinclair to Patrick Sinclair, reserving the disponent's liferent, and on which Patrick was forthwith infeft,) he, the pursuer, is proprietor of the lands and teinds ; and that, although none of these titles may have carried or conveyed the foresaid contract, but only the lands and teinds, still, the pursuer being also possessed of the character of heir, the contract passed to him as heir, and he is therefore, *in titulo*, to sue upon it. The Lord Ordinary has not been able to arrive at the conclusion that the pursuer's title can be supported on this ground. He conceives that, to the transmission of the contract, it is necessary that the pursuer shall connect himself with it, either by sufficient assignations, or a sufficient assignation thereof, or by showing that some title has been made up capable of carrying and transmitting it from James Sinclair down to himself. It is thought that the pursuer has not satisfied either of these alternatives.

SINCLAIR
v.
BREADALBANE.
1840.

“ The Earl of Breadalbane had conveyed the superiority of Lybster to Sinclair of Ulbster, and it subsequently came to be vested in Captain Gunn of Braemore ;—and the first link in the progress of transmission is a precept of *clare constat*, 17th February 1768, by Captain Gunn, as superior, in favour of Alexander Sinclair, as the heir of James Sinclair, the disponent in Lord Breadalbane's charter, upon which precept Alexander was infeft, 13th September 1768. The Lord Ordinary is of opinion, that by this title the personal contract to relieve the teinds, and James Sinclair, and his heirs-male, whom failing, his heirs whatsoever, of stipend and augmentations thereof, could not be carried to Alexander Sinclair. Assuming that some form of title was necessary, then—whatever may be the proper form—it is conceived that a precept of *clare* was not an apt or appropriate

SINCLAIR
v.
BREADALBANE.
1846.

one. It could apply only to the feudal estate,—to the lands and teinds in which James Sinclair was infeft; and a title to them having been completed, in virtue of it, there might pass to the heir all obligations therewith connected, which run with the lands and teinds, such as that of warrandice; but there could not be thereby transmitted an obligation or contract of the nature and kind which that in question has been found to be, over which Captain Gunn, as superior, had no power whatever. For that purpose, it was not a *habile* form of proceeding. It is true, that, in the precept, the original contract of vendition and the charter 1691, are referred to; and had the precept been granted by Lord Breadalbane, the obligor in the contract sued on, or his representatives, there might have been room for argument that there was a renewal of the obligation or contract; but the communication of the contract would then have stood upon a totally different ground from that on which it has, in the circumstances, been rested.

“The next step in the progress of transmission is a disposition of the lands and teinds of Lybster, by Alexander Sinclair, to Captain Patrick Sinclair, his eldest son, of 11th June 1774, and infeftment thereon, 20th October 1774. Now, assuming that the contract for protection and relief from stipend and augmentations had been transmitted to Alexander, was it, by the above title, transmitted from Alexander to Captain Patrick? It will be observed, that while Alexander, the disponer, reserved his own liferent, Patrick, the disponent, was infeft shortly after the date of the disposition. The title of Patrick, as founded on this disposition, although he might be heir of Alexander, was a singular title. In the disposition, neither the contract of vendition 1691, nor the original charter, are mentioned. It contains an assignation to the writs and evidents ‘of and concerning the lands and others above disposed,’ but no express assignation to the contract of relief from stipend and augmentations. In this state of matters,—and taking it to be clear, that, as urged by the pursuer, it must have been Alexander Sinclair’s intention, along with the lands and teinds, to transfer to Patrick the contract of relief,—the Lord Ordinary does not see how, consistently with the decision in the case of Horne, it can be held, that by the disposition as framed, and the title completed

under it in the person of Patrick, the contract was assigned or transferred to Patrick. And if it was not, then it is unnecessary to advert particularly to the subsequent steps in the progress of title, which consist of the title completed by the pursuer, the whole being built upon the title of Patrick ; and it being, as it is thought, abundantly manifest, that, if the contract had not passed to Patrick, it could not, through the medium of the titles afterwards made up by the pursuer, be transmitted to him.

SINCLAIR
v.
BREDALEBANE.
1846.

“ Upon the whole, therefore, and without entering more fully into the question, or the arguments of the parties, which, in reporting the case, appears to be unnecessary, the Lord Ordinary is humbly inclined to be of opinion, that the pursuer has not connected himself with the contract of relief ; and in that view, the other and separate points which have been discussed in the papers do not call for any remark.”

The Court repelled the defender's plea, “ That the pursuer had not produced a sufficient title to enable him to found a claim of relief on the clauses of the contract libelled.”

JUDGMENT.
Jan. 16, 1844.

LORD JUSTICE-CLERK HOPE observed,—“ I may say that I do not go on the point—also decided in the case of Lennox, but not arising here—that a clause of writs and evidents carries a right to the accessory benefit of this separate contract. On the import of the obligation contained in the original deed founded on by the pursuer, I think no doubt can be raised. On that point I concur with the Lord Ordinary. I construe, also, the charter granted the same day in the way which the Lord Ordinary has done.”

OPINIONS.

“ The next important point, in the view I take of the case, is, that the pursuer is the heir of line of the creditor in this contract, and the party to whom the right to enforce it belongs, provided the benefit of the contract can be made to belong or accrue to him in that character. Further, he is the heir in the character to which the benefit of the obligation attaches, and heir in that character in whose favour alone it can be of any use. Even if the line of heirs had separated, I should have said that the benefit of the obligation stipulated for by the original party would endure and fall to the heir succeeding to the subject,

SINCLAIR
v.
BREADALBANE.
1846.

for the full and beneficial enjoyment of which the stipulation was made. But no such question occurs here—for the pursuer is the direct male descendant in lineal succession of the party who stipulated for this benefit. In that character he has made up, and refers to, titles to the lands from the ancestor who was the creditor in the obligation, and who at the same time, and by the same deed, acquired the lands. Of course, in that view, the statement of the title in the summons is ample and sufficient. The obligation in question is an accessory contract—a stipulation in favour of the purchaser and his heirs. The original deed conveys the lands to James Sinclair and his heirs-male, or his heirs whatsoever, &c., and then it binds the seller, and his heirs and successors in the obligation in question, to the said James Sinclair and his foresaids, and the same expression is again repeated when the exception is qualified, and when the obligation of relief, in the event of future augmentations of stipends falling on the teinds, is again expressed in favour of James Sinclair and his foresaids.

“ Now, one of the heirs-male of the body of James Sinclair, taken in direct descent, has made up titles to the lands as vassal, and is in possession of the same. I own it appears to me to be a very clear point that such heir is, by virtue of that title, vested in the character and right of creditor in this accessory obligation, stipulated in favour of the granter and his foresaids, and for the full enjoyment of the subject purchased, and is entitled to enforce it without the necessity of any general service, and certainly without the necessity of any special assignation, which, in the case of an heir, could never be expected to be found, unless indeed the occurrence of this very question had been foreseen. The right of succession as heir to the lands, carries to the heir the full right to all the benefits stipulated by the original purchaser in favour of himself and his foresaids. The stipulation in his own favour is a stipulation in favour of his heirs. His title to enforce it was the deed and the charter, which was executed the same day. His heir is the same person as himself. The succession under the titles to the lands gives the heir the benefit so stipulated by this clause in the original conveyance and charter. Indeed such precept of *clare* states the heir into the full right of the original charter and all its

clauses. The precept exactly renews the former title with all its benefits.

SINCLAIR
v.
BREADALBANE.
1846.

“ That the seller in this contract, and who became the original superior, has sold the superiority, and that the heir’s title has been made up necessarily by precept of *clare* from another party, vested by the defender’s ancestor in the superiority, cannot, in my opinion, at all affect the extent or character of the right so vested in the heir. Certainly, I do not comprehend how the seller and granter of the deed can maintain that the situation of the heir is different, because he, the seller, has subsequently sold the superiority ; and if, as against him, the title to enforce the obligation would have been complete if he had remained in right of the superiority, so I think the same result must equally follow here. If Lord Breadalbane had remained in right of the superiority, and if a title had been completed to the lands of the heir, I do not perceive the ground on which the former could have said that the vassal was not in the right to enforce this obligation in favour of the vassal and his heirs. That Lord Breadalbane has sold the superiority, does not make the title of the vassal less broad or extensive, or take from it the inherent right to all the accessory benefits and stipulations for the enjoyment of the subject, contained in the original grant in favour of the purchaser and his heirs.

“ The case of Horne, has, in my opinion, no application. Assuming that the judgment in that case proceeded upon the view of a distinction between the nature of an obligation of warrandice and of relief from future augmentation of stipends, and that in consequence of that distinction, when lands were sold with all the grantee’s right, and title, and interest in the same, still a special assignation was necessary to give the purchaser, as a singular successor, the benefit of this stipulation ; and attending to the important fact, so strongly stated in the House of Lords, that, in that case, eviction had occurred, and the teinds had been burdened long before the sale to the last purchaser, so that the latter could only buy the subject so diminished in value—assuming that the judgment in the House of Lords proceeded on this view, still it turned entirely, in my opinion, on the important and insuperable distinction, as the House of Lords viewed it, between a singular successor and an heir. I am aware that,

SINCLAIR
v.
BREADALBANE.
1846.

in a case to which I shall immediately refer, decided at the close of last session—*Lennox v. Hamilton*, July 14, 1843—which received great consideration in the First Division, Lord Jeffrey rather doubted whether the judgment of the House of Lords actually did proceed on the view contended by the defender, of the nature of an obligation of this kind. But I am not disposed so to narrow the grounds of the opinions delivered in the House of Lords; and I think that the noble Lords who spoke did mean to lay down the doctrine as stated by the defender in reference to that case—although there are expressions as to warrandice and warranty being the same, because they are the same in the law of England, which, I humbly think, are erroneous as propositions in Scotch law. But I take the opinions in the same light as the defender does. The reason why separate conveyance of the contract was required by these opinions is, as I understand them, that the obligation was something different from the proper clauses in a title passing to the purchaser.

“ But then it is also perfectly clear to my mind that these opinions, as they had reference only to a case of a singular successor by purchase, and by a purchase long after the subject was diminished by the eviction from increase in the burdens on the teinds, and who therefore was required to show a special assignation to the right to claim indemnification for that which he had not purchased; so they are limited and applicable only to that case, and do not apply at all to the case of an heir in the subject, who requires no special assignation to any of the benefits stipulated in favour of the grantor and his heirs, by the very title under which he takes as heir. Whether the obligation here is considered as warrandice or of relief, is, in a question with an heir, of no importance, for it goes to the heir who has right to that charter by progress as much as the original buyer.

“ On this point, I am glad to be able to refer to a case, in all leading points very much the same, recently and unanimously decided by the First Division, but not so favourable as the previous case—that to which I referred.

“ Lord Cuninghame, the Lord Ordinary, held that the case of *Horne* did not apply at all in the question with an heir, and was rested entirely on the ground, that, as a purchaser, Mr.

Horne must show special title to that which did not accrue necessarily with the title to a purchaser, and that the right had not been assigned by him. The case was fully discussed in the Inner House. The Lord President takes the same view : so do the other Judges. I refer particularly to the opinion of Lord Fullerton, in whose view of the grounds of the disposal of the case of Horne in the House of Lords, I entirely concur. I admit that, in that case, there were difficulties which do not occur here, where the benefit of the obligation is claimed at once by the heir succeeding to the lands ; but the grounds of judgment apply *a fortiori*."

SINCLAIR
v.
BREADALBANE.
1846.

LORD MONCREIFF observed,—“ I assent to the doctrine maintained under the first proposition in the defender's case concerning the nature of the obligation undertaken by the contract of vendition 1691. I think that I cannot do otherwise, if I am to pay due respect to the high authority of the deliberate judgment of the House of Lords. We have been accustomed to speak of obligations of this nature as obligations of warrandice ; and perhaps some authorities in our law have gone further, by treating such clauses in some points of legal effect as truly clauses of warrandice in the strictest sense. But the authorities in the House of Lords, sifting the matter upon principle, have held that an obligation such as that which here occurs is of an essentially different nature and character from an obligation of warrandice—that it is nothing more than a personal obligation of relief, which does not necessarily, or as matter of course, follow the title or the possession of the lands, or even the teinds referred to, but must be transmitted by express title of assignation or otherwise. And I have no idea that a principle thus practically applied as the rule of judgment in a Scotch case, could be intended to be delivered merely as a principle acknowledged in the law of England. Whatever may be the grounds on which it rests, and into whatever consequences it may be legitimately carried, it was clearly adopted on a deep and careful consideration of the thing itself, as it is known in the law of Scotland ; and I certainly do not think that it is in itself, in any respect, adverse to the fundamental principles of the law of Scotland, but rather in accordance with them, whatever difference of opinion may have existed as to what should

SINCLAIR
v.
BREADALBANE.
1846.

be taken as a sufficient title for transmitting such a right, as consisting in a personal obligation, separate and distinct from the title to the lands or teinds. I must, therefore, adopt and follow the principle so laid down as a fundamental point in the present case.

“I cannot so entirely assent to the second proposition in the defender's case. I certainly do consider the omission to insert the clause in the charter, as expressly provided by the contract, as a most important fact in reference to more than one point of this cause. But I am not just prepared to say, that if an action had been brought on the contract recently after the date of it, it could have been held, that, because the clause was not repeated in the charter, which was the act of the venders, the obligation must be considered as having been wholly abandoned or evacuated. I doubt that much, and if it were necessary to resolve such a question, I could not so decide. But it does not appear to me to be at all necessary to the defender's case, that that proposition should be assumed.

“But when we come to the third point, ‘as to the transmission of the right,’ certainly the first, and a very important fact is, that the obligation was not repeated in the charter executed on the same day with the contract. This cannot be regarded as altogether a casual occurrence, or an omission to be held as supplied by any general words which may be amply satisfied by other things in the contract, seeing that the contract expressly provided that it should be so repeated. When Mr. Sinclair accepted of the charter so framed, I think that he assented to a material change on the nature and state of the right stipulated for. It is not necessary, in my view, to say that he renounced or abandoned the obligation itself, as expressed in the contract. What he did was, to leave it to stand on that separate personal obligation, and to take the title to the lands and teinds, without any such obligation being expressed in the body of that title.

“This becomes of the most vital importance, in the view taken of this subject by the House of Lords in the case of Horne. It can scarcely be disputed, and does not seem to be so, that if, by the title of the charter, the lands and teinds had passed into the hands of a third party purchaser, without any

express assignation of the contract obligation of relief, such third party would not have been *in titulo* to claim upon it. I see, indeed, that in the case of Lennox, to which I have been referred, the Judges of the First Division have taken a much narrower view of the judgment in the case of Horne. To that I shall advert. But looking to the argument in the present case, and the views which I had thought myself bound to take of the judgment of the House of Lords, I should have thought it impossible to draw this case out of the operation of it, if the title founded on had been that of a third party purchaser. As the case stands, it is not precisely so. But when the actual course of transmission which took place, and the state of the rights at the time when the question is raised, are attended to, it does not appear to me, on a careful attention to the principle laid down by the House of Lords, that the pursuer can be in any better situation in respect of any active title. The result seems to be simply, that he got the lands and teinds, with the ordinary proper warrandice for sustaining the title applied to them, as carried by the charter, and nothing more.

SINCLAIR
v.
BRENDALBANK.
1846.

“As the charter did not contain the obligation of relief from stipends, the sasine on it could not be broader, and by the position already explained as the basis of the argument, the separate personal obligation did not pass merely by the title to the lands and teinds with ordinary warrandice. How, then, did it pass to the heir of James Sinclair? The only title made up by him, Alexander, was by precept of *clare constat*. Most certainly that could vest or transmit nothing but the feudal estate which was vested in James by the charter, and the sasine upon it. That mode of entry is not at all like a special service, which always includes a general service, whereby all personal rights which were vested in the deceased are carried to the heir. An entry by precept of *clare* has no such effect. It takes up nothing but the feudal estate as standing by the investiture.

“It is not stated that any other form of title was made in the person of Alexander Sinclair; and thus, keeping in view the insufficiency of the charter, there is a complete hiatus in the very first link of the necessary chain of transmission to the pursuer. Whether anything else could have been done with effect is not the question; and where the question is only raised

SINCLAIR
v.
BREADALBANE.
1846.

after the lapse of one hundred and forty-four years, without any attempt to act or take document on the obligation, it would be vain to enter into any such inquiry. On the titles as they stand, the personal claim on the contract was not effectually transmitted even to Alexander Sinclair.

“The next link in the progress is, if possible, still more defective. Alexander could not have conveyed or transmitted a right which he never had vested in his person ; but he did not attempt to do so. This disposition to Patrick, which was clearly a singular and new title, though it might be a family arrangement, makes no mention at all either of the contract or of the charter, and far less of the special obligation of relief from stipend. Unless, therefore, the mere title to the lands and teinds, given by that disposition, shall be held to vest the right in that obligation, directly contrary to the doctrine of the House of Lords, and even of this Court in the last decision, it is impossible to say that Patrick got any right to it at all. And when it is considered that at that time, 1768, James and Alexander had been liable for stipends during more than seventy years, it must be apparent that it was not even intended or contemplated that the disposition should convey any such right. It is unnecessary to trace the progress further ; but though the pursuer got a charter of confirmation of his father Patrick’s sasine, he himself again entered by precept of *clare constat*.

“In looking at the deed of disposition by Alexander to Patrick, it might even involve the same question of intention, as if Patrick had been in the strictest sense a singular successor, as purchaser or creditor. But it is quite clearly a singular title ; and whatever might be in intention, the question is, whether it effectually conveyed the separate personal right assumed to have been constituted by the contract 1691. As it makes no mention either of the obligation itself, or of the contract, or of the charter, it can only be held that it did convey it, either simply by the conveyance of the lands and teinds, which cannot be said, consistently with the doctrine expressly held by the House of Lords, with reference to the sasines which were produced in that case, or otherwise by means of the general assignation of the writs and evidents ‘ of and concerning the lands

and others above disposed.' And I understand it to be on this, that the Judges have gone in the case of *Lennox, &c.*, 14th July 1843, but with a clause of a very special nature, conveying the writs and evidents, with the whole obligations, clauses of warrandice, and other clauses therein contained; and the original title in that case was a feu-charter, on which apparently infestment had followed, thus making it a question between superior and vassal.

SINGLAE
v.
BRENDALBANE.
1846.

" When the case of *Horne* was before this Court, I expressed an opinion, though with considerable difficulty, that an obligation of this nature, though not passing simply with the lands and teinds, might be distinguished from such a right as a tack of teinds, to which the case of *Graham v. Don* related, to the effect of holding it to pass as a title-deed, by a general clause of assignation of the writs and evidents. It seems to have been assumed in the judgment in the case of *Lennox*, that the House of Lords have said nothing against this, and that the case of *Horne* was decided merely on the ground that the deeds of conveyance, in which the clause of writs and evidents was assumed to stand, had not been produced. Now, although we must of course pay all manner of respect to the view thus deliberately expressed by our brethren of the First Division, and could not with propriety decide on the opposite view without consulting all the Judges, I must own that this appears to me to be far too narrow a construction to be put on the whole proceeding in the House of Lords. The general ground on which that House decided was, that the party founding on the obligation had not produced sufficient evidence that that obligation, as a separate right or title, had been validly transmitted to him. And no doubt, in the end, there was a serious defect, in so far as the two dispositions, by which it was said to be assigned, had not been produced. The seisin on them being produced, which was enough for a title in the lands, we here had thought—though in strict proceeding we were wrong in that—that the pursuer might be allowed to assume that the dispositions had been in the usual form, and must have contained the ordinary clause of style assigning writs and evidents.

" But though Lord Cottenham held the production of those dispositions to have been indispensable, that does not, in my

SINCLAIR
v.
BREEDALBANNE.
1846.

apprehension, by any means exhaust the grounds of his judgment, or leave the question as to the effect of such clauses of writs and evidents untouched. On the contrary, it is evident to me that he rejected the distinction which I thought might be drawn between the case of *Graham v. Don*, and the case of *Horne*. He adopted the authority of that case, as showing the law of Scotland to be, that such an obligation does not pass by the title to the lands ; and he surely must have taken it with the express quality on which the question turned, that there was there, in the title-deed produced, a very broad clause of writs and evidents. Yet he refers to it as making law for *Horne's* case, and goes on to say—' Then comes the question, if it requires a particular assignation of the benefit of this contract, what evidence have we of any such assignation ?' &c. I cannot think that these terms would have been at all satisfied by the production of dispositions containing the mere words of style, without any such particular assignation.

" The case of *Lennox*, however, shows that this matter is otherwise regarded by other Judges. For that was precisely a case of transmission through various singular successors, and except for the specialty of a charter of confirmation having been granted by the same superior, would have been, in this point, the very same case with that of *Horne*, with only the difference, that the deeds were produced. Unless, therefore, the other Judges are very decided in their opinions on the present case, otherwise I should think that it would be highly necessary to have a consultation of the whole Court as to the true effect of the judgment in the case of *Horne*.

" There is perhaps a separate point, as to what title is necessary to vest the right in the heir of the original grantee. To say that it is simply vested by the title to the lands, would be to go against the point so explicitly laid down by the House of Lords. My present impression is, that, in the view now taken of it, where it is not incorporated in the title to the lands, it must be considered as a personal right, but a personal right connected with the lands and teinds, yet distinct from the title in the lands and teinds themselves ; and so an heritable right of a certain order, though not entering the investiture, to be taken up and transmitted, as among heirs, by general service or

express assignation—and which cannot pass to singular successors without such an express assignation.

SINCLAIR
v.
BREADALBANE.
1846.

“ Under these circumstances, I am of opinion, with the Lord Ordinary, that the pursuer has failed to establish his title to insist in the claim set forth in his summons, giving him all latitude as to the form of that claim.”

On the case being appealed, It was “ ordered and adjudged, that the interlocutor complained of in the said Appeal be, and the same is hereby reversed, and that the defender in the action to which the said Appeal relates, be assolized from the conclusions of the summons.”

JUDGMENT.
Journals of
the House
of Lords.
Aug. 14, 1846.

LORD CAMPBELL observed,—“ My Lords, in this case this was an action of declarator of relief and payment, brought by James Sinclair against the Marquis of Breadalbane. The pursuer, in his summons, describes himself as ‘ heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof’—and the prayer of the summons is, that the defender may be decreed to pay to the pursuer, as heritable proprietor of the said lands and teinds of Lybster, the money, victual, &c., which the pursuer and his predecessors have paid in respect of sundry augmentations of stipend.

OPINIONS.

“ The defender pleaded, among other pleas in law, that the pursuer has not produced a sufficient title to enable him to found a claim of relief.

“ The Lord Ordinary, Lord Wood, made avizandum of the case to the Second Division of the Court, with a note intimating his opinion that the pursuer had not sufficiently connected himself with the contract of relief.

“ When the case came to be decided, Lord Moncreiff agreed with the opinion of Lord Wood ; but the Lord Justice-Clerk, Lord Medwyn, and Lord Cockburn, being of a contrary opinion, an interlocutor was pronounced, which repelled the plea I have stated, with others, and remitted the cause to the Lord Ordinary to proceed on a plea denying that the defender represents the party to the contract.

“ Against this interlocutor there is an appeal to your Lordships, and I am of opinion that it ought to be reversed. But, my Lords, I by no means yield to the argument urged for the

SINCLAIR
v.
BREADALBANE.
1846.

appellant at the bar, that the obligation sued upon is a mere personal contract, which, upon the death of James Sinclair, to whom it was given, went by confirmation to his executors. This might be so by the law of England, yet it seems quite clear that by the law of Scotland such an obligation does not go to executors, although it may be so far collateral as not necessarily to pass with the land or teinds to singular successors. It does not come within the definition, in any Scotch law-book of authority, of things which go to executors; there never has been an instance of executors suing on such an obligation; and whatever difficulties have been started as to the mode of its transmission, I believe that no Scotch lawyer has ever supposed that it was part of the personal estate of the grantee.

“I beg leave likewise to mention, that I am not influenced by the argument that the warrandice is not introduced at length into the charter by the Earl of Breadalbane, for I think that this charter contains words expressly and specifically referring to the warrandice in the contract, which must be considered as embodying it in the charter according to the common maxim, *‘verba relata inesse videntur.’*”

“I arrive at the conclusion, that the defender is entitled to be assoilzied, from the manner in which the pursuer has shaped his case in his summons, and the manner in which he has supported it by proof. Now, my Lords, the right in which the pursuer makes this demand, I think, is only as heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof. At the time when this action was commenced, a notion seems to have prevailed in Scotland that such a warrandice against augmentation of stipend, like a warrandice of title, passed with the land to singular successors, and upon this notion the summons seems to have been framed. There is no allegation in the summons, that the pursuer is heir of the grantee, or any statement how he is heir, or any claim in the capacity of heir. The grantee may be his ancestor, and all the averments of the summons may be true, and yet he may not represent the grantee as heir. He alleges, and he has proved, that he is heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof. But in the case of *Maitland v. Horne*, this

House held that an obligation by a disponent of lands to relieve the disponent of all future augmentations of stipend, does not, without a special assignation, pass to singular successors. Here no such special assignation is alleged and proved. That decision has been complained of, but it is binding on this House as well as on the Courts below, and I think it is inconsistent with the interlocutor appealed against.

SINCLAIR
T.
BREADALBANE.
1846.

“But, still further, if it were thought that the pursuer’s summons, aided by his condescendence, amounts to an allegation that he claims as heir-at-law of the grantee of the obligation, I do not think that his proof is sufficient to sustain his allegation. I entirely adopt the reasoning upon this point of Lord Wood, where his Lordship investigates the pursuer’s title as proved, in a very clear and accurate manner, and shows, to my entire satisfaction, that the pursuer does not sufficiently connect himself with the contract, either as heir or as singular successor.

“Taking this view of the case, I do not feel it necessary to offer any opinion upon the plea of prescription, or upon any other question which has been raised in the case.

“Supposing that such obligations continue unaffected by lapse of time when they are to be enforced, the pursuer should be held to considerable strictness of allegation and of proof. Being revived after having long lain dormant, they have a tendency to produce much vexation and much litigation from the difficulty of finding who are to sue and be sued upon them, and the remedy over, by way of indemnity, which may successively be obtained by those who are found liable.

“Upon the whole, I move your Lordships that the interlocutor appealed against be reversed, and that the defender be assolizied from the conclusions of the summons.”

LORD COTTENHAM observed,—“My Lords, having had the benefit of seeing the opinion of my noble and learned friend, which he has now stated to the House, I entirely concur with him in the view he has taken of the case, and it is not necessary therefore for me to enter into it.”

LORD BROUGHAM observed,—“My Lords, I have not read the judgment of my noble and learned friend, but I recollect the case perfectly. I attended at the hearing, and it appeared to me to be a case of the greatest importance, as it respected

SINCLAIR
v.
BREKADALBANE.
1846.

the Scotch practice, and I certainly did incline at the time, very strongly incline, to think that the interlocutor appealed against was wrong, my mind going along with the reasoning of the learned Lord Ordinary, Lord Wood. That was my impression at the time, my Lords ; and I recollect having so very strong an opinion on the subject, that I suggested to my noble and learned friend near me, who first spoke, who presided upon the occasion, that we might dispose of it then ; but as we were to reverse the judgment of the Court below, it was deemed necessary to take a little time to consider it, as we always naturally look more minutely into a case when we differ from the learned Judges of the Court below."

1. In the case of *HAMILTON v. MONTGOMERY*, January 28, 1834, the pursuer's superior held certain lands with the teinds, with a right of warrandice over other lands in the event of augmentation of stipend. The superior granted to the pursuer's author a feu-disposition of the lands and teinds, with this declaration and agreement, that in case of augmentation or eviction of the teinds, the vassal should be allowed to retain as much of the feu-duty as should be correspondent to the augmentation or eviction. The feu-disposition contained a clause of assignation to "the haill writts, rights, evidents, and securities made, granted, and conceived, or that may in anyways be interpret in favour of me or my predecessors or authors, of or concerning the lands and others abovedisponed." An amount of augmented stipend having been

allocated on the lands exceeding the feu-duty allowed to be retained by the original feu-disposition, in the event of such eviction, the pursuer, who was now the vassal in the lands, raised an action of declarator and relief against the defender, who was now the proprietor of the warrandice lands, concluding to be relieved out of these lands of the augmented stipend.

2. The pursuer *pleaded*,—That the feu-disposition being with the teinds, the assignation to writs and evidents must be effectual to entitle the vassal to found on all rights of his superior, capable of protecting the right conveyed; and that the warrandice from augmentation, contained in the original conveyance of the lands, must be held to have been assigned to the vassal, to the effect of enabling him to protect the teinds convey-

ed to him in the feu-disposition. The defender *pleaded*,—That the pursuer had no title to found on the warrandice right contained in the original conveyance of the lands to his superior, that there was no conveyance of that right of warrandice in the feu-disposition, and that the assignation of writs and evidents could be of no other force than to make the writs belonging to the disponent available to the disponent, for the defence of rights actually conveyed, but that it could never in itself operate as a conveyance of rights. The Court assailed the defender.

3. LORD GLENLEE observed,—“It is clear that the pursuer has no right whatever, under the assignation to the writs, further than to have them made forthcoming, in order to maintain those rights which were really conveyed; and after the decision of *GRAHAM v. DON*, I could never have imagined that such an assignation could be founded on to a greater extent. That was a much stronger case than the present, as there was something like a special general assignation; and the Court held, that though the right in question was a tack of teinds, which may be carried by assignation, yet the assignation to writs could only be used to support the right actually conveyed, but could not convey the tack itself. The only benefit that the pursuer can get by the assignation of writs, is to defend by them what was conveyed to him by Stewart, but not to get something further. Now, what was given? There was no warrandice against farther aug-

mentations, except under the clause allowing him to retain the feu-duty, and to the extent of maintaining that right if disputed, he might found upon the writs assigned, but to the effect claimed he has no right whatever.”

4. The import of the two decisions in *GRAHAM v. DON* and *HAMILTON v. MONTGOMERY*, is thus stated by the Court, in the case of *RENTON v. ANSTRUTHER*, Dec. 14, 1843: “What was settled by these two decisions, we apprehend, was this, and no more,—That where in a regular deed of conveyance by a person infeft, the subjects to be conveyed are distinctly specified and set forth in a proper dispositive clause, or other sufficient clause of conveyance, the terms of that leading clause shall be taken as the measure of the rights so given; and the extent of the grant thus constituted shall not be varied, enlarged, or restrained by the terms of any subsequent clause of assignation of writs and evidents, which, when annexed to such a cardinal disposing clause, must be viewed as subsidiary only, and be construed and have effect only in subordination to that substantive clause of conveyance, and not according to the literal import of the words in which it may be expressed. These cases were mere illustrations of the very elementary and familiar principle or maxim in the law of Scotland, that it is the exclusive privilege of the dispositive clause, in all instruments where there is such a clause, to define and settle what it is that is conveyed, and that no

other clause intended substantially for different purposes shall ever be so construed as to control or limit its operations; they therefore leave quite untouched the more general question, as to the effect of an assignation of writs and evidents, where it stands alone, and not in connexion with any such overruling antecedent."

5. "The case of *Don* in 1814, proceeded indisputably on the same general ground, of the impossibility of controlling or enlarging a specific grant constituted by leading clauses of conveyance, by the terms of a relative assignation of writs and evidents, however comprehensive those terms might be. It happened in that case that there was no proper dispositive clause; the conveyance to the heirs of entail being in the form of a procuratory of resignation by a proprietor infest. But such a procuratory, as Lord Stair has observed, 'has in it the effect of a disposition,' and is, in fact, a full and direct disposition of the subjects resigned to the superior in the first place, to whom it expressly 'surrenders, upgives, and delivers' the subjects resigned, and in the next place, and in substance, to the heirs in whose favour he is required to grant new infestment. It is accordingly quite settled that the original specification in a procuratory of the subjects resigned, where the conveyance is completed in this form, is as exclusively the measure of the grant, as a similar specification in the dispositive clause is, where the title is meant to be made up under a precept of sasine;

and, accordingly, the specification and description of these subjects in the charter of resignation is always and necessarily identical with that in the procuratory, which is in this respect, its sole pattern and warrant."

6. "There could not possibly be a stronger case than that of *Don* for questioning the absolute supremacy of the proper dispositive or conveying clauses in fixing the extent of the grant, and preventing its being enlarged by any accessory provisions; and, accordingly, Lord Balgray, who was very learned in conveyancing, when the case first came before him as Lord Ordinary, found that the right to the tack of teinds was effectually conveyed by this clause to the heirs of entail; but on farther consideration, the Court, and at last unanimously, altered this judgment; and in respect the heirs could take only what was resigned by the procuratory, and given anew by the charter of resignation, found that 'the general clause of assignation to writs and evidents annexed to the procuratory of 1708, was not a due and sufficient conveyance of the tack of teinds in question to the heirs of entail.'"

7. The main difference between the case of *HORNE v. MAITLAND* and that of *BREADALBANE v. SINCLAIR*, was, that in the former case the pursuer was a singular successor, and in the latter he was alleged to be the heir of the original grantee in the obligation of relief. The pursuer, in the former case, produced a progress in which two of the earlier dispositions were

wanting, but it is thought that even if they had been produced, they would have been held by the House of Lords insufficient to transmit the obligation sued upon, unless they had contained, not a mere general assignation to the writs and evidents, but a special assignation to the obligation. In the latter case, the pursuer's progress commenced with a precept of *clare constat*, which was manifestly incapable of transmitting more than the feudal estate. Had the infeftment proceeded on a special service, which includes a general one, or had there been a general service independent of the infeftment on the precept of *clare constat*, this first defect in the pursuer's progress would have been supplied. But the subsequent steps of the progress must have been equally regular and formal, in order to vest the right under the obligation in the party seeking to enforce it.

8. The case of *LENNOX v. HAMILTON*, July 14, 1843, was a case between superior and vassal. In the original feu-charter, granted in 1737, and carrying both land and teinds, the superior bound himself to warrant the feu-right from "all future augmentations of ministers' stipends that might affect the tithes above disposed." In 1778, the superior granted a confirmation to a disponee of the original vassal. This charter narrated the original charter, and the original vassal's disposition, with relative infeftments, and confirmed the same in "the haill heads, articles, clauses, tenor, and contents thereof," and

declared "this general confirmation to be as valid and effectual to all intents and purposes as if the said dispositions and instruments of sasine before mentioned had been herein before *verbatim* insert." In this charter, the superior's obligation to relieve the vassal from augmentations of stipend was omitted, and the vassal was taken bound to relieve the superior from payment of all ministers' stipend. In 1798, the lands and teinds came by progress through a variety of singular successions, none of whom entered with the superior, to the pursuer's ancestor, and ultimately by succession to the pursuer himself. In 1815, the superior granted a charter of resignation and confirmation, and in it, as in the charter of 1778, the warrandice in the original charter against augmentations of stipend was omitted, and the vassal was taken bound to relieve the superior "from payment of all minister's stipend." This charter made no mention of the original charter, nor did any of the conveyances in the course of the progress contain a specific mention of the warrandice against augmentations, but all of them contained an assignation to the writs and evidents of the lands, with the whole clauses of warrandice, and other clauses therein contained.

9. The pursuer, who was a singular successor in the feu, brought an action of relief against the superior, founding upon the obligation contained in the original charter. His title was sustained. One of the grounds on which the judgment proceeded was, that the

obligation sued upon formed part of the original feu-charter, and that it could not be held to have been discharged by its having been omitted in the subsequent charters by progress granted by the superior. LORD FULLERTON observed,—“ Upon this ground, there is a distinction between the case of Horne and the present in another respect, and one which operates strongly in support of the transmission of warrandice. In that case, it was necessary for the pursuer to make out that warrandice against augmentations ‘ran with the lands,’ that is, virtually adhered to the property of the lands independently of any express assignation, or direct connexion between the grantor of the warrandice and the pursuer. For there, the sale of the lands was a sale out and out, with procuratory and precept, so that the warrandice was an entirely separate contract between Sinclair and Lord Breadalbane, who had sold to him. That contract might be held to require an express transmission from the original grantee in order to preserve its effect against Lord Breadalbane, between whom and any subsequent acquirer of the lands there existed, by the force of that acquisition, no privity of contract whatever. But here, the superior feued out the lands, and made the obligation to relieve from augmentations a part of his obligation as superior, so that when the vassal came to sell, he must be held to have substituted the purchaser for himself in that original contract, and thus brought every subsequent

acquirer in direct connexion with the superior, in relation to the obligation of relief. There is good ground for holding that such an obligation would go with the lands, and that the purchaser would be entitled to insist that the superior should repeat it in any new charter. No doubt, the vassal might perhaps be held to have waived it, if he took a charter of confirmation, leaving it entirely out of his title. But the charter of confirmation of 1778 clearly involves a confirmation and renewal of the original clause of warrandice. That charter confirms the original charter and the subsequent disposition, and that ‘in the haill heads, articles, clauses, tenor, and contents of the foresaid dispositions,’ and declares ‘this general confirmation to be as valid and effectual as if the said dispositions had been herein *verbatim* inserted.’ Even if it could be held that the charters of confirmation in 1815 and 1839, were not sufficiently explicit in the matter, there is not at this moment any bar that I can see against the pursuer obtaining a reduction of those charters, and a renewal in the terms of the charter 1778.”

10. LORD JEFFREY observed,—“ With regard to the charter of 1815, I am not moved by the difficulty raised ; and though I think the answer is sufficient, that prescription has not run upon it, I hold the canon of construction applies to it, that when you find the obligations of the vassal are kept up as originally, those in his favour in the original charter are to be implied in this, which is a charter

by progress. I therefore see no necessity for a reduction of it. In the case of *M'LEOD*, 5. Br. Sup., p. 615, there is a strong confirmation of the doctrine of Craig and Erskine as to the effect of omissions in charters by progress, viz. that all the clauses of the original charter are implied, if there be no express alteration."

11. The view taken in this case by the Court of the import of the case of *HORNE v. BREADALBANE'S TRUSTEES*, was different from that taken by LORD MONCREIFF in delivering his opinion in the case of *SINCLAIR v. BREADALBANE*. LORD FULLERTON observed,— "It is maintained by the defender, founding on the case of *Horne v. Lord Breadalbane*, that the clause of warrandice was not effectually carried by the transmission of the lands. On looking to that case, and the grounds of judgment in the House of Lords, it does not appear to me to support the objection. It does not decide that a warrandice against augmentations of stipend cannot in any case be validly transmitted by assignation to 'writs and evidents, and clauses of warrandice therein contained.' The ground of judgment there seems to have been, that such a clause 'did not run with the lands,' but required special assignation or conveyances to transfer it; and that, in the circumstances of that case, there were breaches in the line of connexion between the party to whom the warrandice had been granted, and the pursuer, who sought to make it good. Here, that question does not arise,

for in all the transmissions of the lands, there was an assignation to the writs and evidents, including the warrandice. It may be said that a clause of warrandice of the lands, in the proper sense, is different from a relief against augmentations. But an assignation of warrandice must be held to include everything that the parties call by that name. It is quite competent to make an agreement to relieve from augmentations in the form of a clause of warrandice. That was the form adopted in the original disposition 1737, and under that form it must be held to have been conveyed on the subsequent transmission of the property. On this point, then, I do not see any difficulty in holding that, even according to the principles laid down in the case of *Horne*, there is here a sufficient transmission."

12. LORD JEFFREY observed,— "The only point, therefore, which leads to any difficulty is the application of certain views thrown out by the House of Lords in the case of *Horne*. Accordingly, I have looked very carefully into that case, and no doubt there are certain statements about an obligation of this nature being different from an obligation of warrandice; but I am sure that the *ratio decidendi* did not proceed on any such ground. I agree with Lord Fullerton, that the much stronger ground was, that there was there not a continued obligation between the superior and vassal, which is the case here. There was ground, therefore, for saying, in that case,

that there was no clause of warranty which could run with the lands. But I don't even see that the judgment went on that ground. The ground on which it ultimately proceeded was, that the House of Lords held that there was no evidence of the assignation. The deeds were not produced, and their contents were unknown. It was necessary for the pursuer to show evidence of the transmission, and he had not done so; and accord-

ingly, the result was, that it was held that he had failed to connect himself with the contract on which he founded; that, assuming it to be transmissible, he on whom the *onus* lay had not shown that he had right to it. Looking to all these circumstances, and to the whole tenor of that case, I don't feel myself constrained, but rather the reverse, to alter the interlocutor of the Lord Ordinary."

A general Conveyance of Lands is sufficient to found an action against the granter's heir to denude, or an action of adjudication in implement of the conveyance.

BROUGH v. GLOVER.

Dec. 7, 1810.

NARRATIVE.

A mutual deed of settlement was executed by David Brough and his wife. The dispositive clause was in these terms:—"Assigned, disposed, and made over, as we hereby assign, dispose, and make over in favour of the longest liver of us two, our haill goods, gear, debts, sums of money, bonds, bills, tickets, accounts, household plenishings, utensils and domiciles, body clothes, *and every subject, whether heritable or moveable*, that shall happen to pertain or belong to, or that can in any wise be claimed by us, or either of us, at the time of the death of the first of us two. Dispensing with the generality hereof, and declaring these presents to be as good and effectual, as if every subject hereby conveyed, were specially enumerated and set down."

The wife having survived her husband, she executed a general disposition and settlement, in favour of the defender and others as trustees. On her death, the pursuer, as heir at law of David Brough, brought a reduction of the mutual settlement between him and his wife, and of her settlement in favour

of the defenders, on the ground that the mutual settlement imported only a settlement of personal property, and was insufficient in law to convey the heritable estate.

BROUGH
v.
GLOVER.
1810.

PLEADED FOR THE PURSUER.—The heir of line is the favourite of the law, and his interest cannot be affected, except by a clear intention of his predecessor, fully and legally expressed to that effect. In the transference of heritable property, the law of Scotland requires a rigid adherence to its own forms. No deed executed according to the law of a foreign country will convey Scotch heritage. Neither can a man legate and bequeath his heritage. In regulating the succession to it after his death, it must be in the form of a disposition *de presenti*, and formal dispositive words are necessary for the effectual nomination of an heir, to the exclusion of the heir of line.

ARGUMENT FOR
PURSUER.

The deed in question is defective as a disposition of heritage. The subject claimed is not expressly disposed, and the deed contains neither procuratory nor precept. The subjects enumerated in the deed are moveable subjects. The general clause added to the previous specification, must be held to be restricted to subjects of the same nature with those previously enumerated. It cannot be supposed that it was intended to convey a valuable land estate, and yet not to have specially mentioned it. The place which the general clause occupies in the deed, shews that it was only intended to include moveable property of every description.

PLEADED FOR THE DEFENDER.—It is admitted that mere will or intention by itself is not sufficient to effectuate a conveyance of heritable property. A deed in writing, accompanied with certain forms and solemnities, is essentially requisite for that purpose. Still, however, the *will* of the proprietor is the chief and most important ingredient. The very rule of law which requires certain forms and solemnities to the written deed of conveyance, is intended to prevent an alienation of property, where the owner did not deliberately intend it. But where the intention is clear, and the deed contains expressions which in fair construction are sufficient to comprehend the subjects which he intends to convey, effect will fall to be given to the

ARGUMENT FOR
DEFENDER.

BROUGH
v.
GLOVER.
1810.

deed, although the expressions used may not be the most appropriate in the technical language of conveyancing.

The deed in question contains technical expressions, sufficiently broad and appropriate for carrying heritage. A conveyance of heritage must be in its form a *de presenti* conveyance, and not a mere testamentary deed. The dispositive words in the present deed, are "dispone, assign and make over." The particular expressions employed in the deed, comprehend not only moveables, but "every subject, whether heritable or moveable." The heritable subjects are conveyed by a separate and distinct mention of them in the dispositive clause, apart from and in addition to the moveable means and effects. For after the moveable means and effects are enumerated, the conveyance is carried farther, by the unequivocal words, "and every subject, whether heritable or moveable, that shall belong to us, or either of us."

From the whole tenor and construction of the deed, therefore, it is clear that the deed was not only intended to carry heritage as well as moveables, but that it is also expressed in terms sufficiently comprehensive and proper, for giving effect to that intention.

Interlocutor of
Lord Ordinary,
June 21, 1810.

The Lord Ordinary found, "That in legal construction, the said parties cannot be understood to have disinherited their heir, or to have meant anything more than a conveyance of moveables."

JUDGMENT.
Dec. 7, 1810.

The defenders reclaimed, and the Court "Altered the interlocutor reclaimed against, repelled the reasons of reduction, sustained the defences, and assoilzied the petitioners."

OPINIONS.
Baron Hume's
Session Papers, MS.
Notes.

LORD MEADOWBANK observed,—“In the case of *Cairnie v. Welsh*, the deed was less apt for conveyance of heritage, and yet was sustained.”

LORD SUCCOTH.—“The words are dispositive, and if followed immediately with mention of all heritable and moveable subjects, would be sufficient to carry them. But the difficulty is, that there follows an anxious enumeration of moveable subjects only. The mention of heritage is only at the end of that enumeration, and being relative to a higher class of subjects, it is not to be applied to any but moveables—things of the same

class as those specially enumerated. At the same time, intention, I rather think, was in favour of defenders. As also, the word 'subjects' is more properly applicable to heritage than the words 'means' or 'effects.' On the whole, though with hesitation, I incline to alter."

BROUGH
v.
GLOVER.
1810.

LORD CRAIG.—"The words are dispositive, and sufficient to convey if the subjects are properly described. The second question is more doubtful—the special enumeration being relative to moveables only, and heritage is mentioned in the end only. On the whole, however, I am inclined to think we cannot disregard these words. Heritable effects would not do, because heritage is not effects. But heritable subjects is a proper term known in law. The case of Cairnie is in point, where the word immoveable carried the house."

LORD PRESIDENT BLAIR.—"Deed inaccurate, but good to convey, so far as it goes. It conveys all subjects whether heritable or moveable, which makes a purpose to convey two kinds of subjects distinguished from each other. If these words had been by themselves, they most clearly would have conveyed. The difficulty is, that an enumeration of moveables precodes it. But I doubt much whether we can sustain the mere order or arrangement of clauses, to defeat the broad words themselves. As to order of clauses, law prescribes nothing. If the deed had begun with these general words, it is clear that the after specification of moveables would not restrict it—nor does it vary the law, that the heritable clause follows.—I am for altering."

In the Faculty Collection, the President is reported to have observed,—FACULTY REPORTS. "That in order to transfer a feudal right, a technical and formal deed, with procuratory and precept, was necessary ; but to make a valid settlement of heritage, which the law will recognise, and render effectual, nothing more is necessary than dispositive words, expressing the will of the granter, whether general or special. In the present case, the words 'assign and dispoⁿe *every subject, whether heritable or moveable,*' are sufficiently broad to comprehend heritage, and the generality of them is no objection to their validity. It is a general conveyance of heritage to be made effectual by an adjudication in implement."

1. In the case of *WELSH v. CAIRNIE*, June 28, 1809, the deed was in the form of a testament, but it contained dispositive words, and one clause, after enumerating various kinds of moveable subjects, was followed by the general words, "and every other moveable and immoveable subject of whatever denomination." The Court sustained the deed as a valid conveyance of heritage.

2. LORD PRESIDENT BLAIR observed,—“In form, though not in substance, the old rule of not settling heritage by testament remains. But we apply it very strictly. The word *dispone* is here, also all immoveable subjects—which applies to houses. The decisions mentioned on either side are of two kinds—either that the *description* of the *subjects* did not apply to heritage, as in *Ross’* case, or they are cases where the deed is not executed according to the law of Scotland. But here are proper disposing words and proper description, and the different clauses shew the testator’s will to be to give the house to one person in life-rent, and to another in fee. As to the title, the more regular way would be by an action of declarator and for implement, and on that decree to adjudge in implement. But as the matter is here, we should give our judgment on the meaning of this deed.”—BARON HUME’S SESSION PAPERS, MS. NOTES.

3. In order to facilitate the transference of land, the clauses usually inserted in conveyances are reduced by the Act 10 & 11 Victoria, cap. 48, to a very simple

form. The clause of OBLIGATION TO INFEST, if limited to an obligation to infest *a me* only, is held to imply an obligation on the disponent to infest the disponent and his heirs and assignees in the subjects conveyed upon their own expenses, to be held from the disponent, and his heirs and successors, of and under their immediate lawful superiors, in the same manner as the disponent himself or his predecessors held or might have held them, and that either by resignation or confirmation, or both, the one without prejudice of the other. If the obligation to infest is granted to be holden *a me vel de me*, it is held to imply an obligation on the disponent to infest the disponent and his heirs and successors upon their own expenses, by two several infestments and manners of holding, the one to be holden of the disponent and his heirs and successors, in free blench, for payment of a penny Scots, in name of blench farm, at Whitsunday yearly, upon the ground of the lands if asked only, and freeing and relieving him and his successors of all feu-duties, and other duties and services exigible out of the lands by their immediate lawful superiors thereof. The other of the infestments is to be holden from the disponent and his successors, and under their immediate lawful superiors, in the same manner as the disponent and his predecessors held or might have held the lands, and that either by resignation or confirmation, or both, the one without prejudice to the other.

4. The clause of RESIGNATION,

“and I resign the said lands and others for new infeftment,” is held to be equivalent to a Procuratory of Resignation in the terms formerly used, and in the case of conveyances by a vassal to his superior, it is held as equivalent to a Procuratory of Resignation *ad remanentiam*. The clause of ASSIGNATION OF WRITS AND EVIDENTS—“And I assign the writs, and have delivered the same according to inventory,” unless specially qualified, is held to import an absolute and unconditional assignation to such writs and evidents, and to all open procuratories and precepts contained in such writs and evidents, to which the disponent has right. The clause of ASSIGNATION OF THE RENTS—“And I assign the rents,” unless specially qualified, is held to import assignation to the rents to become due for the possession following the terms of entry, according to the legal and not the conventional terms, unless in the case of forehand rents. In that case, the clause is held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry.

5. The clause of WARRANDICE—“And I grant warrandice,” unless specially qualified, is held to imply absolute warrandice as regards the lands, and writs, and evidents, and warrandice from fact and deed, as regards the rents. The OBLIGATION to free and relieve from feuduties, casualties, and public burdens, unless specially qualified, is held to import an obligation to relieve of all feu-duties, or other duties

and services, or casualties payable to the superior, and of all public, parochial, and local burdens due from or on account of the lands prior to the date of entry. The clause of CONSENT OF REGISTRATION, unless specially qualified, is held to import a consent to registration, and a procuratory of Registration in the Books of Council and Session, or other Judges' books competent, therein to remain for preservation, and also for execution, that letters of horning, and all necessary execution may pass thereon upon six days' charge, or a decret to be interponed thereto in common form.

6. By the same Act, section 5, it is declared competent in all conveyances of land held under any real burdens, or conditions, or limitations appointed to be fully inserted in the investitures of the lands, to omit the full insertion of them, provided they are specially referred to as set forth at full length in the recorded instrument, whether of sasine or of resignation *ad remanentiam*, in which they were first inserted, or in any recorded instrument of sasine of subsequent date, forming part of the progress of titles of the lands. A reference so made is held to be equivalent to a full insertion of the real burdens, conditions, and limitations under which the lands are held in all questions, whether with the disponent or superior or third parties.

7. By the same Act, it is made competent to omit in all conveyances of land held under a deed of entail, the full insertion of the con-

ditions, and provisions, and the prohibitory, irritant, and resolute clauses of the entail, provided they are specially referred to as set forth in full length in the recorded deed of entail, if it shall have been recorded in the Register of Tailzies, or in any recorded instrument of sasine, forming part of the progress of title deeds of the lands held under the entail. A reference so made is held to be equivalent to a full insertion of the conditions and clauses, in all questions, whether *inter heredes*, or with third parties.

8. By the Entail Act, 11 & 12 Victoria, cap. 36, it is declared not necessary in any future entail to insert any irritant and resolute clause, in order to render such entail effectual in terms of the Act 1685, provided the entail contain an express clause, authorizing it to be recorded in the Register of Tailzies. Such a clause of registration has in every respect the same operation and effect as the most formal, irritant, and resolute clause, duly applied to any prohibition, condition, and limitation contained in the entail, except of such prohibitions, conditions, and limitations, as may specially be excepted by the terms

of the entail. The clause of registration must be engrossed as part of the entail in the Register of Tailzies, when the entail is recorded there, and must also be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts, and instruments of sasine following on the entail in the same manner, or as nearly as may be, as irritant and resolute clauses were formerly required to be inserted or referred to.

9. By the Act 8 & 9 Victoria, cap. 35, the following form of a precept of sasine is made competent, and declared to be as valid and effectual with precepts of sasine formerly in use:—"Moreover, I desire any notary public to whom these presents may be presented, to give to the said A. B., or his foresaids, sasine of the lands and others above disposed." If the disposition is granted under burden of a real lien or servitude, or any other incumbrance, condition, or qualification of the right, or under redemption, then the precept must bear—"But always under the burden of the real lien before specified."

SECTION II.

SOLEMNITIES OF CONVEYANCE.

Land cannot be conveyed by a Deed not executed according to the Solemnities prescribed by the Law of Scotland.

EARL OF DALKEITH *v.* BOOK.

IN 1715, Anne Duchess of Buccleugh and the pursuer, with consent of his curators, set in tack to the defender and certain other parties, partners in trade with him, certain lands, &c., belonging to her Grace, within the parish of Canobie. Of the same date with the tack, her Grace and the Earl also granted a letter of bailiary to the defender and the other parties named in the tack, whereby they were constituted, during the years of the tack, bailies as well of regality, as baron bailies within the bounds contained in the tack, with all the usual powers, reserving always to her Grace, and, after her death, to the Earl, to mitigate exorbitant penalties, should any be imposed by the bailies upon the inhabitants in the bounds of the tack. The Earl, after attaining his majority, brought a reduction of this letter of bailiary, on the ground that the subscriptions of the curators were not tested according to the law of Scotland.

Feb. 13, 1728.

NARRATIVE.

PLEADED FOR THE PURSUER.—The deed was signed by the curators in England, and their subscriptions are not tested with the solemnities of witnesses agreeably to the directions of the Act 1681. The deed is therefore void as granted by a minor having curators, without their consent. There is no valid dis-

ARGUMENT FOR
PURSUER.

EARL OF DAL-
KEITH
v.
BOOK.
1728.

inction between a party-granter and a party-consenter. A writing, for want of proper consents, can never be the foundation of an action to grant a right with such proper consents. In the present case, there is no proper consent, since there is no legal proof of it. The letter of bailiary, which was to be the foundation of a jurisdiction in Scotland, required all the solemnities prescribed by the law of Scotland, for the same reason that a disposition of any feudal right in Scotland is regulated not by the law of the place where it is signed, but by that of the county where the lands are situated. It is a different case with regard to contracts that are *juris gentium*, and obligations which a man may come under by a deed executed according to the rules of the place where the parties happen to be.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—As the letter of bailiary was not executed in Scotland, the deed must be sustained if it was executed according to the law of the place where it was signed. All conveyances of land rights and jurisdictions in Scotland, wherever they are executed, must be executed according to the Scots form, otherways they are not valid conveyances; but an obligation to grant a disposition, or to grant a jurisdiction in Scotland, will be an effectual obligation to grant such disposition, or such jurisdiction, if it is executed according to the law of the place where it is signed. Every grant implies an obligation to make the grant effectual. The letter of bailiary, therefore, though not executed according to the Scots form, is a good foundation for an action to renew it according to the Scots form.

JUDGMENT.
Feb. 13, 1728.

The Lords found “the letters of bailiary null as to the Earl of Dalkeith, in respect there are no witnesses adhibit to the curators’ subscriptions, but found the allegiance, that the Earl has homologated the tack, relevant to validate the letters of bailiary, in respect the tack and letters of bailiary are to be considered as *unum negotium*; and found that the letters of bailiary being for a jurisdiction in Scotland, they ought to have been execute in the Scots form, and remit to the Ordinary to hear parties farther on the deeds of homologation.” To this interlocutor the Court

Jan. 14, 1720.

afterwards adhered, and refused the prayer of the defender's reclaiming petition to have it found, "that the pursuer was bound to renew the letters of bailiary according to the Scots form."

EARL OF DAL-
KEITH
v.
BOOK.
1728.

Lord Kames thus reports this case in the Folio Dictionary, under the head of FOREIGNER,—“A disposition of an heritable jurisdiction in Scotland, made in England, after the English form, was not sustained even against the granter, to oblige him to grant a more formal disposition, though it was pleaded that such a disposition must at least have the force of an obligation good against the granter and his heirs, though it would not avail in a competition with a more formal right; and if such a disposition would produce action in England against the granter, to renew a more formal right, it might also be a good ground of action in Scotland, seeing obligations, of whatever nature executed, *secundum consuetudinem loci*, are effectual in Scotland.”

Folio Diction-
ary, vol. i. p.
319.

Lord Kames also reports the case in the Folio Dictionary, under the head of WRIT, in the following terms:—“A deed granted by a minor, with consent of his curators, being challenged for this reason—that there were no witnesses to the subscription of curators,—answered, witnesses are not necessary to the subscription of consenters, but only of principal parties, who are to be bound by the deed. The Lords found the Act 1681 was general, and therefore sustained the objection.”

Folio Diction-
ary, vol. ii. p.
544.

1. The probativeness of a deed depends on the proper solemnities being used. A deed to convey land may be formal in having the proper dispositive words, and may still be improbable. So also it may be probative in being executed with the proper solemnities, and may still be defective in form as a conveyance. The case in the text is

thus referred to by Mr. Erskine in his Institute:—“In the conveyance of an immoveable subject, or of any right affecting heritage, the granter must follow the solemnities established by the law, not of the country where he signs the deed, but of the State in which the heritage lies, and from which it is impossible to carry it. For though

he be subject with respect to his person to the *lex domicilii*, that law can have no authority over property which hath its fixed seat in another territory, and which cannot be tried but before the Courts, and according to the laws of the State where it is situated. This rule is so strictly adhered to in practice, that a disposition of an heritable jurisdiction in Scotland, executed in England after the English form, was not sustained as an obligation to compel the granter to execute a more formal conveyance. *EARL OF DALKEITH v. BOOK.*—*Erskine*, 3, 2, 40.

2. The case of *EARL OF DALKEITH v. BOOK* is not, however, an authority for holding that an onerous deed of conveyance, invalid by the law of Scotland, although valid by the law of the place where it was executed, will not import an obligation to convey. The case in the text is peculiar, from the conveyance having been the act of a minor having curators, but of whose consent there was no proper evidence before the Court. The deed purporting to be evidence of their consent could not be looked at by the Court, because it was not tested according to the law of Scotland. A minor cannot convey without consent of his curators. As that consent was, therefore, not properly evidenced to the Court, there was, in point of fact, no legal conveyance before them. But an informal deed of conveyance, if granted for an onerous consideration, may become binding on the granter by *rei interventus*, or homologation. Accordingly,

the Court found, that the averment that the Earl had homologated the tack was relevant to validate the letters of bailiary. See next section, OBLIGATION TO CONVEY.

3. LORD KAMES, in his "Principles of Equity," observes,— "Land, in particular, next to persons, is the greatest object of law; and in every country the acquisition and transmission of land are regulated by municipal law. Our law, for example, with respect to the transmission of land, properly requires writing in a certain form. Such a writing is held a good title of property, whether executed at home or abroad. A writing, on the other hand, in a form different from that prescribed by our law, will be disregarded wherever executed; for our law regards the solemnities only, not the place. Thus, a testament made in England bequeathing land in Scotland is not sustained, because, by our law, no man can dispose of his land by testament. Nor will it be regarded that land is testable in England, because every thing concerning land in Scotland is regulated by our law. In general, the connexion of a land-estate with the territory where it is situated is of the most intimate kind—it bears the relation of a part to the whole. Thus every legal act concerning land, the conveying it *inter vivos*, the transmitting it from the dead to the living, the security granted on it for debt, are ascertained by the municipal law of every country; and with respect to every particular of that kind, our

Courts are tied down to their own law."—*Principles of Equity*, 3, 8, 2.

4. In the English case of *COPPIN v. COPPIN*, 1725, it was argued, that admitting the words in the will to have been sufficient to charge the land with the legacies, yet there being but two witnesses thereto, the will as to the land must be void. It was further argued, that it made no difference that the will was made beyond seas, the same being of lands in England, which, if they pass by will, must pass by such a will, and so circumstanced and attested as the law of England requires. The LORD CHANCELLOR held "that the Court could not subject the land

to any other charges than those which the testator by his will had effectually charged it with, and which in this case was nothing, the will being attested but by two witnesses."—*Williams' Reports*, vol. ii. p. 293.

5. "In regard to real or immoveable property, the general principle of the common law is, that the laws of the place where such property is situate exclusively govern, in respect to the rights of parties, the mode of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost, only according to the *lex rei sitæ*."—*Story's Conflict of Laws*, p. 669.

SECTION III.

OBLIGATION TO CONVEY.

An Obligation to convey Land situated in Scotland, executed in a Foreign Country, according to the law of that country, although not valid by the law of Scotland, will afford ground of action against the Granter and his heirs, to implement the Obligation.

I.—CUNNINGHAME v. LADY SEMPLE.

July 5, 1708.

NARRATIVE.

MUTUAL indentures were executed between the pursuer and his brother, the husband of the defender, whereby they mutually bound themselves that the survivor should succeed to the other's estate, failing heirs of his own body, reserving power to the first deceasing party to provide his wife in the property of a third of his moveable estate, and the liferent of a third of his heritage. These indentures were prejudiced by a disposition granted to the defender by her late husband. The pursuer brought a reduction of this disposition.

**ARGUMENT FOR
PURSUER.**

PLEADED FOR THE PURSUER.—The indentures are formal according to the law of England, where they were entered into, and the form and style of English writs are now frequent and probative, and afford action in Scotland. Although the indentures are not such as to give the pursuer immediate right to be infeft in his brother's lands, they are a sufficient title to pursue his brother's heirs to implement, and denude in his favour.

**ARGUMENT FOR
DEFENDER.**

PLEADED FOR THE DEFENDER.—The indentures are not formal according to the law of Scotland. They cannot, therefore, form

a title on which to claim succession to heritage in Scotland, or one on which to quarrel or impugn a formal conveyance of heritage.

CUNNINGHAME
v.
LADY SEMPLE.
1706.

Personal bonds, contracts, and obligations, concerning moveable sums and goods, may be conveyed and be made effectual against the granters and their estates, if framed and drawn conform to the laws and practice of the place where they reside for the time, because moveables *sequuntur personam*, and are presumed to be where their owners are, and are regulated *jure gentium*. But it is quite otherwise in the conveyance of heritage and tailzies of succession *de rebus immobilibus et feudalibus*. These behoved to be conceived in the form and style of the place *ubi res sita est*. If, therefore, the pursuer and his brother intended a legal settlement of their heritable rights in Scotland, they should have done it conform to the Scots law. In doing it by English indentures, *fecerunt id quod jure nostro non possunt*, thinking to convey Scots lands by an English writ, *et sibi imputent* that they did it not in the forms prescribed by the Scots law.

“The Lords thought this cause of more intricacy and importance than could be determined in the end and hurry of a Session, and therefore delayed the advising of it till June.”

Fountainhall,
vol. ii. p. 273.
Feb. 27, 1706.

“The Lords advised and determined the cause pursued by Colonel John Cunninghame against the Lady Semple, and the defender having withdrawn her papers, and being absent, the Lords found that the indentures produced, made betwixt the two brothers in the English form, and wanting the solemnities required to such writs by the laws of Scotland, were yet a sufficient title and foundation to sustain process at the pursuer’s instance, to claim and affect the estate of his brother lying in Scotland, and to quarrel and reduce any writs given by him to the defender, but superseded to give answer how far these writs were legal, and authentic, and probative by the law and customs of England, or if a commission could be directed to the Judges of the Court of Queen’s Bench to try the same, seeing that this was not at present insisted on and craved.”

JUDGMENT.
July 5, 1706.
Fountainhall,
vol. ii. p. 340.

II.—GOVAN *v.* BOYD.

Dec. 10, 1790.

NARRATIVE.

James Boyd possessed the estate of Pinkhill under an unrecorded entail. In 1783, while resident in America, he granted an obligation to Mr. Carter Bruxton, binding himself "to sign any paper or instrument of writing that may assist in docking the entail of the said estate or estates, and giving the said Carter Bruxton a good right in fee-simple to all or any of them, and to grant a power of attorney to any person the said Carter Bruxton may appoint to claim from him the said estate or estates; and to demand of any agent appointed by Mr. Boyd, a relinquishment of his said interest." The price which Mr. Bruxton was to pay was £6000. The deed containing the obligation was executed according to the law of England.

In implement of the obligation, Mr. Boyd afterwards granted a second deed, also in the English form, authorizing Mr. Bruxton to enter to the possession of all lands to which he himself was entitled to make entry as heir of his father, and to make up titles to such estates, and to sell the lands in the event of its being found that they were held in fee-simple.

Mr. Boyd died in 1784, and in 1786 Mr. Bruxton conveyed to the pursuer the two deeds above mentioned, with all right and title derived by him from Mr. Boyd. Spencer Boyd, the heir of James Boyd, brought a reduction of the deeds granted by the latter in favour of Mr. Bruxton, and also of the conveyance by him to the defender.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The deeds sought to be reduced, not being executed according to the forms prescribed by the law of Scotland, they are ineffectual for conveying or producing an obligation to convey heritage situated in Scotland. In all questions relating to heritage in Scotland, the law of Scotland must govern, and by that law it is an established point that no bargain of which land or other heritage is the subject is binding upon the parties, unless reduced into writing. Till that solemnity be adhibited, either party has full liberty to resile in the same manner as if there had been no bargain at all. And in order to exclude that *locus penitentie* which the law allows in

all bargains concerning heritage, there must be a writing perfected in all the forms which the law requires in order to make a deed completely probative and authentic. The deeds in question, therefore, being null and void by the law of Scotland, are no more effectual for producing a personal obligation to convey lands situated there, than if there had been merely a verbal bargain between the parties, which unquestionably might be resiled from at pleasure, and could not have been made the foundation of a personal action for implement.

GOVAN
v.
BOYD.
1790.

PLEADED FOR THE DEFENDER.—The deeds sought to be reduced, although not tested according to the law of Scotland, being executed accordingly in the English form, are probative and binding according to the law of England. Although, therefore, the deed is unfit, *per se*, to convey heritage in Scotland, yet it is sufficient to support an action in the Courts of Scotland for implement of the obligation which it lays upon the granter, to grant all deeds which might be necessary for vesting the estate in Mr. Bruxton.

ARGUMENT FOR
DEFENDER.

There is a clear distinction between actual conveyances of heritage, and contracts of sale with clauses binding a party to execute such conveyances in favour of another. The conveyances themselves, in order to effectuate the actual transmission, and vest the property in the purchaser, must be drawn out according to the precise forms which our own customs and Acts of Parliament have made necessary for that purpose. In every country there are certain municipal regulations which must be precisely observed, in order to carry the property of land out of one man's person into the person of another. But although the modes of actually vesting the property of lands are thus everywhere regulated by the laws of the particular country where those lands are situated, yet a contract whereby a person binds himself to convey lands, is in its own nature a contract *juris gentium*. The granting of a conveyance of land, according to the forms of the *lex loci* where it is situated, is a fact to the performance of which a party may bind himself in a foreign country, just in the same manner as he may bind himself to the performance of any other fact. With regard to most facts, certain modes and forms must be followed in the country where

GOVAN
v.
BOYD.
1790.

the facts are to be performed, different from those which are practised in the place where the obligation to performance has been granted. The distinction between *actual conveyances* of heritage, and *obligations to convey* heritage, has long been perfectly understood and acknowledged. In regard to the form, wherever they may have been executed, if they have not been executed according to our own form they are good for nothing. But with respect to the latter, if they have the solemnities required by the law of the place where they have been granted, they are as effectual to produce action in Scotland, and to bar the *locus pœnitentiæ*, as if drawn according to our statutory requisites.

Interlocutor of
Lord Ordinary.
Dec. 10, 1790.

The Lord Ordinary found,—“ That the defender James Boyd, by the deeds executed by him in America, in February and March 1783, in favour of the Bruxtons, though not executed according to the forms of the law of Scotland, so as to convey directly heritable subjects in that country, yet he thereby came under a personal obligation in implement, of which he and his heirs might be sued here. And in respect no sufficient evidence has been offered to instruct fraud, facility, or lesion, in obtaining the deeds under challenge, Repels the reasons of reduction, assoilzies the defenders, and decerns.”

JUDGMENT.
March 6, 1792.

The Court altered this interlocutor, on the ground that the deed sought to be reduced had been procured by fraud ; but the principle was acknowledged, that an obligation to convey land executed in a foreign country, agreeable to the laws of that country, ought to afford action in Scotland to force implement of the obligation.

OPINIONS.
Bell's Octavo
Cases, p. 223.

“ LORD ESKGROVE was rather inclined to think that a deed which was to affect landed property in Scotland, must be a legal deed, according to the law of Scotland.”

LORD JUSTICE-CLERK BRAXFIELD observed,—“ Lord Eskgrove has given a doubtful opinion on this question. For my own part, I think that an obligation executed in a foreign country, if executed agreeably to the forms and laws of that country, must receive effect here. If it be an obligation to dispoſe, an action for forcing the granter to convey, or an adjudication in implement, will be effectual.”

"LORD MONBODDO agreed with the LORD JUSTICE-CLERK, and also the LORD PRESIDENT."

GOVAN
v.
BOYD.

1790.

On the papers in this case, LORD PRESIDENT CAMPBELL has first written,—“Second Point attended with difficulty:—See Duke of Hamilton *v.* Douglas, House of Peers Case, 1798, No. 19.” He afterwards writes,—“As to Second Point—A personal obligation or contract executed *secundum legem loci contractus*, is available to bind the person, and this will found an action for implement, and decree of constitution being recovered, an adjudication may follow.”

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

1. “As no law has authority beyond the dominions of the law-giver, they who found on foreign deeds, though perfected agreeably to the laws of that country where they are signed, cannot in strict law demand execution of them in another country, where different solemnities are required to deeds of that kind; but such deeds are nevertheless, by the practice of all civilized nations, supported *ex comitate*, from the regard due by one state to the laws of another. All personal obligations or contracts entered into according to the law of the place where they are signed, or, as it is expressed in the Roman law, *secundum legem domicilii, vel loci contractus*, are deemed as effectual when they come to receive execution in Scotland, as if they had been perfected in the Scottish form. This holds even in such obligations as bind the grantor to convey subjects within Scotland. For where one becomes bound by a lawful obligation, he cannot cease

to be bound by changing places. But though obligations to convey, if they be perfected *secundum legem domicilii*, are binding here; yet conveyances themselves of subjects within Scotland are not always effectual, if they are not executed according to the solemnities of our law.”—*Erskine*, 3, 2, 39, 40.

2. LORD KAMES, in his Principles of Equity, observes,—“Are we to hold that a conveyance of land in a form different from what is required by us can have no effect? Suppose a man sells in England his land estate in Scotland, executes a deed of conveyance in the English form, and perhaps receives payment of the price. Such conveyance, not being in the form required by the law of Scotland, will not have the effect to transfer the property. But has the purchaser any claim in Scotland against the vender? None at common law; because a Court of common law hath not authority to transform an actual disposition into an obliga-

tion to dispoſe. But ſuch claim is ſupported in equity; becauſe where a man, in order to transfer his land to a purchaſer, executes a diſpoſition which is afterwards diſcovered to be imperfect, it is his duty to execute a perfect one, and if he be refractory, it is the duty of a Court of Equity to compel him, or to ſupply his place. If the action be laid within the territory where the land is ſituated, the judge, in default of the diſponer, may adjudge the land to the purſuer; if in any other territory, all that can enſue is damage for not performance. A diſpoſition of land within Scotland, without procuratory or precept, will not be regarded at common law; but a Court of Equity, attentive to juſtice, will interpoſe in behalf of the purchaſer, by adjudging the land to him. Thus with reſpect to an informal conveyance of land within Scotland, the Session acts as a Court of Equity, and it acts as an extraordinary Court for foreign matters, where a conveyance is executed abroad according to the law of the place.”—*Kames’ Principles of Equity*, 3, 8, 2.

3. In the Session Papers in the caſe of the *EARL OF DALKEITH v. BOOK*, preſerved by Lord Kilkerran, the unreported caſe of *LADY MARY COCHRANE v. COLONEL ERSKINE*, is thus given by the defender:—“The Lord Someldyck in Holland had an heritable debt over the eſtate of Kincardine. He conveyed this debt by diſpoſition to Lady Mary Cochrane. The diſpoſition was executed not according to the Scots form, but ac-

cording to the forms preſcribed by the laws of Holland. The diſpoſition having been objected to, the Court held that it was not a valid deed to convey, but that it was probative of the obligation upon the granter to convey, and found it a good ground, upon which Lady Mary might adjudge the ſubject diſpoſed.” In the pleadings for the Earl of Dalkeith, this caſe is thus adverted to:—“My Lord Someldyck’s deed was not objected to for want of any proper conſents. He had power by himſelf to grant the deed. Neither was his ſubſcription quarrelled as not duly attested; it was attested according to the laws of Holland. That ſuch a deed might produce an action againſt Lord Someldyck or his heir, is nothing to the preſent caſe. If Lord Dalkeith and his curators had granted a letter of bailiary to the petitioner only in a wrong form, in the Engliſh ſtyle, inſtead of the Scots, there might have been ſome parallel, but there is none as the matter ſtands.”—*Kilkerran’s Session Papers*.

4. LORD ELCHIES in his Annotations obſerves,—“There is a pretty remarkable deciſion on the queſtion, How far our lands and other real rights in Scotland, may be conveyed or affected by writs in other countries, wanting the ſolemnities that in Scotland are neceſſary for transmitting ſuch ſubjects? As to the laſt, there is little doubt. Bonds for example, after the Engliſh form, without writers’ and witneſſes’ names and designations, as they would be effectual not only for perſonal

diligence, so are they likewise for being the foundation of adjudication. *MASTER of SALTON, v. LORD SALTON*, July 5, 1673. The other point was disputed and determined, July 5, 1706, *CUNNINGHAM v. LORD SEMPLE*, upon a question, How far an indenture made in England, in relation to the succession of two brothers, according to the laws of England, should be effectual as to lands in Scotland, notwithstanding that, in these indentures, the solemnities necessary for transmitting heritable subjects in Scotland were not observed? And it was found that these indentures were effectual to oblige the heirs of the defunct to denude, in the terms of the indentures."—*Elchies' Annotations*, p. 4.

5. Mr. Story is of opinion that a contract regarding land would not be valid, if not executed according to the country where the land is situated. He observes,—“It seems very clear that a contract made in a foreign country, for the sale of lands situate in England, Scotland, or America, would not be held a binding contract in either of those countries, to be enforced in their Courts *in personam*, or *in rem*, unless the contract was in conformity to the forms prescribed by those countries.”—*Story, Conflict of Laws*, p. 546. In another passage he observes,—“But after all, looking to the great diversity of views of Foreign Jurists, there is much reason to be satisfied with the general rule of the common law on this whole subject; that is to say, that in respect to moveables,

the law of the place where the contract is made, will, with few exceptions, be allowed to govern the form and solemnities thereof, but as to immovables, no contract is obligatory or binding, unless the contract is made with the forms and solemnities required by the local law where they are situated.”—*Story*, p. 546.

6. Mr. Burge, on the other hand, observes,—“A farther distinction may be made between those solemnities which relate to contracts and instruments for the transfer of real property, and those by which it is actually transferred. With respect to the first, those are to be followed which prevail in the place where those contracts are made or those instruments executed; but in regard to the actual transfer of such property, those are to be observed which are prescribed by the law of the place where it is situated. Thus, a contract to sell or mortgage real property will be valid, if the solemnities are observed, which are required by the law of the place where the contract is made, and will be the foundation of a personal action against the party to that contract, to compel the transport or mortgage of such property, but no transport or mortgage will be complete, nor will the *dominium* or property have been transferred or acquired, unless those solemnities are observed, which are required by the law of the place where it is situated.”—*Burge*, i. 24.

7. In another passage Mr. Burge observes,—“In considering

the law by which the transfer of immovable property is governed, a distinction should be made between the contract to transfer, and the actual transfer of the *dominium*. A contract to make such an alienation as would in any of these respects contravene the law of the *situs*, would be wholly ineffectual. But when the contract does not expressly nor by necessary implication contravene it, but on the contrary may be carried into effect consistently with, or by means of its provision, although the contract itself may not give a title, yet it will be the foundation of an action by the one to compel the other to complete it in that manner which the law of the *situs* requires, in order to give him that title."—*Burge*, ii. 844.

8. The correct rule appears to be this. An express obligation to convey land, executed *secundum legem loci contractus* will be enforced in Scotland. A gratuitous conveyance of land, invalid by the law of Scotland, either in regard to the proper solemnities not having been used, or in regard to the proper dispositive words having been omitted, will not have effect given to it, either as a deed of conveyance itself, or as importing an obligation to convey. An onerous conveyance of land, on the other hand, although not effectual as a conveyance itself, will be held to import an obligation to convey, and will in that view afford ground of action against the granter and his heirs, to implement the implied obligation.

SECTION IV.

ADJUDICATION IN IMPLEMENT.

Superiors are bound to enter Adjudgers in Implement, and where two Parties adjudge in Implement, and neither of them is infest, the Party first charging the Superior will be preferred.

SINCLAIR v. SINCLAIR.

IN 1696, John Bruce disposed certain lands to Sinclair of ^{June 21, 1704.} Southdun. In 1697, he disposed the same lands to Sinclair of ^{NARRATIVE.} Barroch. The heir of Sinclair of Southdun charged Bruce's heir to implement the terms of the disposition 1696, and thereafter he obtained a decree of adjudication in implement of the obligation contained in that disposition. Sinclair of Barroch also obtained an adjudication in implement of his disposition 1697. His adjudication was posterior to that of Southdun, but he had charged the superior to enter him, which Southdun had neglected to do. A competition ensued.

PLEADED FOR SINCLAIR OF SOUTHDUN.—Both adjudications ^{ARGUMENT FOR FIRST AD- JUDGER.} being led in implement of dispositions, the superior was not bound to enter either party. By the feudal law, a superior was not bound to receive any other vassal than that of the investiture, but by his own free consent. And although there be several statutes obliging superiors to enter apprisers, which is by other acts extended to adjudgers upon payment of a year's rent, yet all these statutes relate to apprisings or adjudications for liquid sums of money. In these cases, the superior has his

SINCLAIR
v.
SINCLAIR.
1704.

option either to enter the appriser or adjudger, or to pay the debt for which the diligence is led. But in an adjudication for implement, the superior would lose the benefit of redeeming which the law provides to him by payment of the debt. This very case is stated by Sir John Nisbet as a doubt, and the reason he gives is, that the superior has *Retractus Feudalis* by paying, which takes no place in the case of dispositions. There is no reason to oblige superiors to receive adjudgers in implement, more than resignations upon voluntary dispositions.

ARGUMENT FOR
SECOND AD-
JUDGER.

PLEADED FOR SINCLAIR OF BARACK.—Anciently, conveyances of land were little known except by succession, marriage, or forfeiture. Afterwards, conveyances of land came to be more frequent, both by voluntary purchases and diligences, and the interest of superiors was limited, especially in favour of creditors. The first vestige of comprising mentioned in the law, is 37th Act 5th Parl. James III., which authorizes comprising of land, and obliges the superior to enter comprisers upon payment of a year's rent, or to pay the debt. Adjudications were not then, nor for some time thereafter known; but in process of time adjudications were introduced of two sorts, one upon the renunciation of apparent heirs, *contra hæreditatem jacentem*, and the other for implement of facts. This last was a diligence introduced not by statute but by custom, to make obligations effectual. Such adjudications did always proceed by process before the Lords of Session, not as comprising, and by the constant uniform style the superior is decerned to enter adjudgers, and horning passes thereon of course. The common style of dispositions bears an obligation to infest and seise the receiver of the disposition, which obligations were frequently the only foundation of real rights, when procuratories of resignation and precepts of sasine expired by the death of the buyer or seller. And by the 18th Parliament 1669, a year's rent was appointed to be paid by adjudgers to superiors in the same way as comprisers. This Act could only relate to adjudications *contra hæreditatem jacentem*, and in implement, because then comprising were in force for liquid debts. If it were not so, adjudications in implement would be elusory and ineffectual, unless the superior did freely and voluntarily make them good. This

would be a manifest defect in the law, and as necessity introduced adjudications in implement, the same necessity must give them their full effect. As to the superior's privilege of redeeming, that might be valuable when first introduced, but superiors have not of late laid any claim to it, nor can it be of use, because when diligences pass now they generally exceed the value, and vassals designing to alienate grant bonds even gratuitous to what value they please, which a superior cannot impugn.

SINCLAIR
v.
SINCLAIR.
1704.

The Lords preferred the second adjudger, who first charged the superior. JUDGMENT.
June 21, 1704.

LORD FOUNTAINHALL observes,—“ The Lords thought the diligence, by charging the superior, warrantable, and that to find otherwise, were to insignificate all the adjudications which have been led for implement of dispositions ; and therefore preferred Barack, who had charged on his adjudication, to Southdun, who, apprehending superiors were not obliged to enter parties on such charges, did neglect that step of diligence as superfluous.” Fountainhall,
vol. ii. p. 231.

*An Adjudication in Implement is not subject to be ranked pari passu,
with other Adjudications of any kind.*

CAMPBELL v. MACVICAR.

By minute of sale the pursuer purchased the estate of Kerrion from Robert Campbell of Kerrion. In implement of this minute, he obtained a decree of adjudication, dated 3d July, 1744. Upon this decree of adjudication he obtained a charter from the superior, dated 26th August 1747, and upon the 1st of September thereafter, he was infeft upon the charter. July 23, 1752.
NARRATIVE.

The defender being a creditor of Campbell of Kerrion, adjudged that estate in payment of his debts. The decree of adjudication was dated 10th July 1744, and the superior was charged on 15th October of the same year, but no charter was obtained.

The pursuer brought a declarator, to have it found that upon

CAMPBELL
v.
MAUVICAR.
1752.

his paying the balance of the price to the preferable creditor, the heritable and irredeemable right of the estate of Kerrion should be declared to pertain to him and his heirs for ever. The defender objected, and insisted that his adjudication should be ranked *pari passu* with the pursuer's adjudication in implement.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—Adjudications in implement do not rank *pari passu* with adjudications for payment of debt. It is a mistake to suppose that adjudications in implement were introduced after 1661. They are of as old a standing as adjudications *cognitionis causa*, and both of them were known in practice near two centuries before the Restoration. It is clear, from the Act 1661, that adjudications in implement were not intended to be brought in *pari passu* with apprisings. The Act declares “that the benefit foresaid introduced hereby anent comprisings, shall be extended to adjudications for debt.” At this period there were no adjudications for debt, but adjudications *cognitionis causa*, which also had a legal and the same endurance with apprisings. Those, therefore, are comprehended under the statute, not by implication, but in express words. But there is not a word about adjudications in implement, although at that period they were as common diligences in law as adjudications *cognitionis causa*. This was no oversight on the part of the Legislature, who could not but see that an adjudication in implement, and an apprising on an adjudication for debt, are not capable of a *pari passu* ranking. Each is preferable, according to the priority of diligence. A charge against the superior, without the offer of a year's rent, and a charter to be signed, is not sufficient to bar the superior from giving a charter to an adjudger in implement. But, at any rate, an adjudger in implement first infest is preferable to an adjudger charging before the infestment.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The defender's adjudication falls to be ranked *pari passu* with the pursuer's, which is but seven days anterior to the defender's. The words of the Act 1661 are general, and extend not only to apprisings and adjudications now come in their place, but also to what bore the

name of adjudications before that period, and which had been introduced by necessity without the countenance of statutes. The exceptions from the general rule are specially enumerated in the statute, and are confined to apprisings upon real burdens previously affecting the lands. Every other apprising, therefore, and adjudication *cognitionis causa* or in implement, fell to be comprehended under the general rule.

CAMPBELL
v.
MAGVICAR.
1752.

But if an adjudication for debt does not come in *pari passu* with an adjudication in implement, so neither can an adjudication in implement come in *pari passu* with an adjudication for debt. Hence an adjudication for debt first completed and made effectual, will exclude an adjudication in implement upon which nothing has followed, although prior in date to the adjudication for debt. Upon this principle the defender's adjudication is preferable to that of the pursuer, in regard it was followed by a charge against the superior before any diligence for procuring infestment was done by the pursuer on his adjudication. An adjudication in implement is certainly not effectual from its date. Even an adjudication of a naked personal right without infestment, is not effectual from its date, so as to denude the party having right to the personal right. Much less does an adjudication without infestment denude a party actually infest. If, therefore, the pursuer's adjudication had been followed by no charge or infestment, it would never have denuded Kerrion of his estate. If, again, the defender's adjudication was completed before Kerrion was denuded, it must be preferable to the pursuer's adjudication.

The defender charged the superior to enter him upon his adjudication as late as the 15th of October 1744. The pursuer did not procure his voluntary infestment till 1747, after the competition was proceeded in. A charge against a superior is as much a legal method for completing an adjudication for debt, as an adjudication in implement, and it is equally so whether standing alone or meeting each other. Agreeably to this, the Lords found, 21st June 1704, *Sinclair contra Sinclair*, the adjudication in implement, whereon a charge had proceeded, was preferable to another of the same kind on which no charge had been given, and the reason of the decree is expressed, that as the Lords thought the diligence warrantable, so to find other-

CAMPBELL
v.
MACVICAR.
1752.

wise were to make all adjudications in implement ineffectual. But the Court has never found that an adjudication for debt, followed by a charge, which, if by itself, or in competition with others of the same kind, would be effectual, loses that effect which the charge had given it whenever an adjudication in implement appears to compete with it.

A charge against a superior is not confined to being a rule of preference between adjudications for debt among themselves, or between adjudications in implement among themselves, but is a general rule extending to both. It is a method fixed upon by law, for rendering adjudications of all kinds effectual, and without which, or an actual infeftment, no adjudication is complete. In all questions, therefore, upon adjudications in implement, as well as others, an adjudger charging a superior, is held to be infeft in competition with others who are not infeft, and have not used any diligence for that purpose.

JUDGMENT.
July 23, 1752.

The Lords preferred the pursuer.

1. "Adjudication is *remedium extraordinarium*, introduced by custom, where apprising could have no place, as when the debt to be satisfied is not a liquidated sum, or goods ordinarily liquidable, but is a disposition of lands, containing expressly or virtually an obligation to infeft the acquirer, or some other; or an obligation consisting in some fact to be performed; or otherwise, where the debtor's heir renounces to be heir, whereby there is no party from whom the lands can be apprised; therefore *hæreditas jacens* is adjudged. This remedy is introduced by the Lords, who, having ample power to administer justice in all cases, and to make orders to

that effect, do supply the defect of the law, or ancient customs, by such new remedies as such new occurring cases do require, amongst which adjudication is a prime one, which Craig testifieth to have been unknown to our predecessors; and being but recent in his time, and few decisions thereupon, the nature and effect of it was little known, but is now by course of time further illustrated. Adjudication hath place in two cases. The first and most ordinary is, when the heir renounces to be heir, in which case adjudication is competent, whether the debt to be satisfied be liquidated or not. The other is, when the obligation to be satisfied consisteth *in facto*,

and relateth to a disposition of particular things, which disposition or obligation not being fulfilled by the debtor or disponer, though all ordinary diligence be done, then adjudication taketh place to make the same effectual."—*Stair*, 3, 2, 45.

2. "This manner of adjudication is extended no farther than to the thing disposed, and hath no reversion unless there be a conventional reversion in the bond and disposition to infeft. But this kind of adjudication comes not in with others of that, or any other, kind, and there is more reason that the superior should have a year's rent, if the disposition be of the fee, and irredeemable, than in other adjudications. But these adjudications do not become effectual by a charge, yet as a legal diligence, it will exclude posterior voluntary rights. And these adjudications do not come in *pari passu* with other adjudications within the year, nor any other with them."—*Stair*, 3, 2, 53.

3. "There are many kinds of adjudications now in use. As, first, an adjudication for perfecting dispositions of rights of the ground which require infeftment, whether in fee or liferent, and whether in property or annual-rent, when the disponer is either expressly or implicitly bound to infeft the acquirer, and oftentimes to infeft himself for that effect, yet hath not performed the same, justice requiring some legal remedy to make such dispositions and obligations effectual, which would have been very tedious and ex-

pensive, if the acquirer had no other remedy, but first to use personal diligence against him to liquidate the damage, and then to apprise thereupon, whereby the acquirer, having a real right, if not complete, might easily be prevented by any creditor who had only a personal debt. Therefore the Lords, who by their institution and authority are empowered to make rules for despatch of justice, whose power is thereby like that of the Roman Prætor, *ubi lex deest Prætor supplet*, did sustain process at the acquirer's instance against the disponer to fulfil, and against his superior to supply his place, and to receive the acquirer, in the same way as he might have done upon his vassal's charter of Confirmation or procuratory of Resignation."

4. "But this being at first *remedium extraordinarium*, the Lords did not sustain it, so long as there was an ordinary remedy by horning and caption against the disponer, to perfect the disposition or obligation to infeft. But now, adjudications becoming so ordinary remedies, not only in this, but in many other cases, and being all executive actions, there is no ground to delay the acquirer till he obtain a decreet, and use all personal diligence, whereby he may be readily prevented by the adjudications of personal creditors; especially considering, that if the disponer be dead, there behoved to be an action against the heir, for fulfilling the disposition, and thereupon a decreet and all personal execution, before he could have

a judicial disposition to supply the voluntary disposition promised. And therefore, in either case, this adjudication should proceed, unless the acquirer, of his own choice, should please to insist in the personal execution."—*Stair*, 4, 51, 9.

5. "In an adjudication in implement, there is no place for a legal reversion, or a right to redeem within a certain time; for it is led, not for the payment of a debt, but to give full effect to an imperfect grant made voluntarily in favour of the adjudger. It therefore carries from the granter the subject disposed absolutely and irredeemably, in the same manner as if the disposition had been voluntarily perfected by the granter himself, and so leaves no room for any reversion, unless reversion had been stipulated in the deed, for the fulfilling of which the adjudication is led; in which case, the conventional reversion must subsist as being an original condition of the right. On the same principle, the *Retractus Feudalis*, or option competent to the superior to redeem upon payment of the debt to the value of the lands, can have no place in these adjudications. This is also peculiar to them, that no adjudication of any other kind can be preferred *pari passu* with them, nor they with others, for though the Act 1661, relative to the *pari passu* preference of apprisings, is, by a special clause, extended to adjudications for debt, or to adjudications upon decrees *cognitionis causa*; yet adjudications in implement cannot fall under that appellation; and in-

deed this last sort, being led for one special purpose, and affecting one special subject, appears not to have come within the view of the Legislature. It has, however, been found, that in a competition between two adjudgers in implement, where both the parties were in *pari casu*, the last in date was preferred, because he had given the first charge to the superior, *SINCLAIR v. SINCLAIR*, June 21, 1704."—*Erskine*, 2, 12, 51.

6. The nature of adjudication in implement is thus described by Mr. Bell in his Commentaries: "Adjudication in implement differs from an adjudication for debt, 1. In being directed against a particular subject, in order to have an imperfect conveyance of it completed. 2. In having no alternative conclusion or reversion, unless such be the nature of the obligation to be implemented. And 3. In being, in its nature, exclusive of other creditors, admitting of no *pari passu* preference. It may be defined, a form of legal diligence by which the want of a complete voluntary title to land, or other heritage, is judicially supplied to those who hold a disposition, or other conveyance, without a precept or procuratory, or who hold an obligation entitling them to demand a full conveyance of any particular subject. It is merely the completion of the *form* of a transference already constituted in part, and which the proprietor had bound himself to complete. Like a voluntary transference when followed by sasine, it bestows a real and preferable right from the date

of the sasine. Adjudication in implement is led against the granter of the imperfect title himself, if alive, in the same manner as a common adjudication for debt. If the adjudication is to be led against the heir, the previous forms of a general charge, action of constitution, and either special charge or decree *contra hæreditatem jacentem*, must be observed according as the heir shall renounce or be silent. This adjudication is to be completed by an abbreviate recorded, and a charter from the superior followed by a sasine."

7. "The effect of a charge to the superior, in a common adjudication for debt, depends entirely upon the force of the Statute, and it has no effect as a preference except against co-adjudgers. It seems, therefore, extremely doubtful, whether any effect should be given to a mere charge upon an adjudication in implement. It has, indeed, been found, that where no step has been taken to complete the first adjudication in implement, a second, with a charge against the superior, was entitled to a preference, but this has always been held a doubtful judgment, and is not to be taken implicitly as settling that a charge gives security to such an adjudger. It seems indisputable, that in competitions with voluntary securities, such a charge could be no bar to sasine, and would not entitle the adjudger to a preference. Neither could such a charge stand against an adjudication for debt, completed by infeftment subsequently to its date. Neither does there seem to

be any ground for holding that the second adjudger in implement, with the first infeftment, would not be preferable to the first, who had only charged the superior."—*Bell*, 1, 748.

8. In the case of *MACGREGOR v. MACDONALD*, March 9, 1843, a competition arose between two adjudications in implement. Colonel Macdonald obtained his decree on March 20, 1829. His competitors, the trustees of General Macgregor, obtained their decree on November 12, 1829. These trustees were also the superiors of the lands in competition. Colonel Macdonald charged them to grant him a charter of adjudication, and on their refusal he denounced them, and then passing them over, he obtained a charter from the next superior, in March 1830, on which he was infeft. The trustees, on obtaining their decree of adjudication in implement, granted themselves a charter, and were infeft upon it in January 1830. The Court preferred Colonel Macdonald.

9. LORD MONCREIFF observed,—"Colonel Macdonald's decree of adjudication was obtained on the 10th March 1829, and that obtained by the defenders was not until the 12th November 1829, so that the pursuer had decidedly the first adjudication in implement. When the other mid-superiorities were put out of the way, the immediate title of superiority stood in the defenders themselves. And all that Colonel Macdonald required to perfect his title was to obtain a charter of adjudication from the superiors on which

infestment might pass. There is no doubt now, whatever there might once be, that the superior is bound by the statute to enter an adjudger in implement. The illustrations therefore, attempted by the defenders, from cases of delay in granting a charter of confirmation which no superior is bound to grant, are altogether foreign to the question. The pursuer then, having his decree of adjudication in March 1829, was entitled to demand a charter from the defenders."

10. "If the superior had been a third party, who declined or delayed to give a charter, the pursuer, in order to establish his preference, must at least have shewn a regular charge before any charge by his competitor; and if he did so, he would have come into the rule of the case of Sinclair, 21st June 1704, on the correctness and authority of which so much is said in the papers. The Lord Ordinary can only say, that he is not prepared to overrule it, seeing no contrary decision, and thinking that there is much justice in the principle of it, at least where a superior charged by one party has refused or delayed to give him his charter, and has given a charter to a posterior charger. The case of a first infestment on a second charter by the same superior is quite a different case, the vigilance or the delay lying with the creditor. But the position of the parties in the present case is essentially different. Here the defenders themselves were superiors. The pursuer getting his adjudication in March 1829, was entitled then to demand

his charter. At that time the defenders held no adjudication; and, granting that there might be no incompetency in their granting a charter to themselves at a proper time, the question is, Whether they were entitled to refuse a charter to the pursuer, or delay to grant it, during more than six months, while, in the meantime, they were getting forward their own adjudication, and at last to grant a charter to themselves."

11. "If this were the case of a third party superior, and the defenders had charged all the three trustees, being superiors, on the 31st December, and had then got their charter, it might have been very doubtful whether their first infestment would have been excluded by the pursuer's charges of two trustees on the 30th and 31st December. But this is not the case. The case is, that the defenders knew that the pursuer held the first adjudication. They had intentionally delayed to give him his charter; and, at least by the charge on the 31st December, they had sufficiently formal notice that he did demand it. They refused to give him a charter; and as soon as their own adjudication was ready, they granted a charter to themselves on the 31st December, for the avowed purpose of defeating his right. The regular charges to the three trustees were necessary to enable the pursuer to go to the over-superiors. But they were not necessary in order to render it the duty of the defenders to grant the charter when it was demanded, and to bar them from granting a charter

to themselves. It was enough that they were sufficiently certiorated that he held his decree of adjudication in March 1829, that he had duly charged the intervening superiors, and that he had demanded a charter of them, while yet no other charter existed. The Lord Ordinary is of opinion, that no superior is entitled so to deal with the rights of third parties, demanding that which he is bound by law to grant; and, therefore, that the defenders are not in this case entitled to found on the priority of the infetment obtained by them, by means of what he must regard as a tortuous act in law, whatever view may be taken of the endeavour to exclude the pursuers' preference otherwise." The opinion of Lord Moncrieff was adopted by the Court.

12. In *HUTCHINSON v. CAMERON'S TRUSTEES*, June 26, 1830, the Court held, that neither the creditor who brought a ranking and sale, nor the common agent in the process, were entitled to compare in a process of adjudication in implement, and state grounds against decree being pronounced. The pursuer, before bringing an adjudication in implement of missives of sale, lodged a claim under his missives in the ranking and sale. He afterwards raised an action of adjudication in implement of his missives, when defences were lodged both by the heritable creditor who had brought the ranking and sale, and also by the common agent. The pursuer opposed the title of either of these parties to compare, and his objection was sustained.

LORD GLENLEE observed,—“The heritable creditor has no title or interest to oppose this process; and as to the argument of the common agent, I never heard of such a doctrine as that a ranking and sale creates a community of interest, and prevents any creditor from acquiring whatever preference he can. Previous to the statute, every creditor could go on with his own diligence, and the Act does not extend to adjudications in implement. I can, therefore, see no principle on which the common agent can be allowed to stay this adjudication, that would notequally authorize him to prevent the disponee taking infetment on his disposition. I cannot listen for one moment to the interest of the common agent; but I would reserve all questions as to the effect of the decree when obtained.”

13. In *WOOD v. SCOTT*, July 1, 1830, a party holding a missive of sale, and who was in the course of leading an adjudication in implement, applied to the Court to have the property which formed the subject of his adjudication struck out of a ranking and sale, and the common agent prevented from proceeding with the sale. The common agent *pleaded*,—The personal creditors are prevented by the statute from adjudging. The only diligence open to them is the process of sale. It has been found that they cannot prevent the holder of a missive of sale from adjudging in implement, but as a matter of equal justice, they are not to be prevented from pursuing the process of sale. It is in

fact a race of diligences, in which both parties are entitled to pursue, as vigorously as they can, the respective measures open to them by law for completing their several rights. The Court therefore cannot consistently with justice interfere to enable one of the parties, otherwise in *pari casu*, to obtain a preference over the other, and so tie the feet of the personal creditors, in order that the holder of the missive of sale may overtake them. The Court granted the application of the holder of the missive of sale, and excepted the subject to which his missive related from the ranking and sale.

14. The holder of the missive of sale then effected the completion of a feudal title by decree of adjudication in implement, upon which he obtained a charter of adjudication from the superior, and having taken infestment, he produced the charter and sasine in the process of ranking. The question then arose, what effect was to be given to this completed title, in the competition between him and the common agent, as representing the general body of creditors? Two questions were raised, *First*, Whether it was competent after a process of ranking and sale had been instituted, for the holder of a missive of sale of part of the lands, and producing it *before* decree of certification, to obtain a decree of adjudication in implement, and if competent, what was the effect of such decree in competition with the common agent, as pursuer of the process of ranking and sale? The *second* question

was, What was the consequence, that the decree of adjudication obtained and produced in process, *after* decree of certification was pronounced?

15. The common agent *pleaded*, —The provision in the Bankrupt Act, declaring that a decree of sale should be held as a general decree of adjudication, in favour of every creditor, and that no separate adjudication should be allowed to proceed, during the dependence of a judicial sale, excludes all creditors for money debts, from following out an adjudication for making the same effectual. The avowed object of the statute was “to do equal justice to all concerned.” The holder of a missive of sale is simply a personal creditor in an obligation *ad factum prestandum*, resolvable, if not performed, into a claim for a sum of money as damages and interest. While the right is not made real, such creditor is in no respect preferable to one for a liquid sum of money who has not adjudged. In equity as in law, their claims are on the same footing with simple personal claims, and the holder of the missive has the power of ranking *pari passu*, with the money creditor, by constituting the amount of his claim of damages. Unless therefore the words of the statute clearly and necessarily import an exception in the case of the creditor in an obligation *ad factum prestandum*, separate diligence at his instance must be equally excluded with that, at the instance of all other personal creditors. The words of

the statute, however, are very broad, providing that "no separate adjudication" shall be allowed without any qualification or restriction. These words clearly include all adjudications. In other parts of the statute where adjudications for debt are alone meant, they are specially set forth "as adjudications for debt."

16. The adjudger *pleaded*,—The object of the statute as stated in its preamble was to lessen the number of adjudications for debt, and to facilitate the *pari passu* preference of creditors in similar circumstances. The provision in the Bankrupt Act refers solely to adjudications for debt, and applies exclusively to the case of those creditors who may thereby obtain a *pari passu* preference. There can, however, be no *pari passu* preference between an adjudger for debt and an adjudger in implement, so that the latter class are not comprehended in the intendment of the provision. A party therefore holding a missive of sale may competently proceed to obtain implement, notwithstanding the declaration in the statute, that the decree of sale shall be held to be equivalent to a general decree of adjudication in favour of all the creditors. The consequence of a decree of adjudication in implement being obtained, is to strike the property which is the subject of the decree out of the sale, without prejudice to any questions which may arise between the adjudger and the heritable creditors whose securities extend over it.

17. The Court found, Feb. 5,

1833, "That the adjudication in implement here in question, is not rendered incompetent under the provisions of the Bankrupt Act, by the process of ranking and sale, and if duly deduced, the subject must fall to be struck out of the sale, and remitted to the Lord Ordinary to proceed accordingly, always without prejudice to the legal claims of the creditors infeft in the said subjects." LORD CRINGLETIE observed,—“There is nothing to hinder an adjudication in implement after a ranking and sale is brought. The litigiousity created by the action, only affects the common debtor, and his voluntary acts. Adjudication in implement is not vitiated by the ranking and sale. In fact it annihilates the action of sale altogether. The prohibition in the Bankrupt Statute of leading adjudications during the dependence of a ranking and sale, has no application to adjudication in implement; and the decree of certification cannot affect the decree and titles subsequently obtained, where the grounds of debt were previously produced.”

18. The Bankrupt Statute, 2 & 3 Victoria, cap. 41, enacts in section 25, that in all questions upon the Act, all dispositions, heritable bonds, or other heritable rights, whereupon infeftment may follow, shall be reckoned to be of the date of the registration of the sasine taken thereon, without prejudice to the validity or invalidity of the said heritable rights in all other respects, and that all dispositions, assignations, and venditions, which do not require sasine, but

in which intimation or delivery is requisite, in order to render them complete as transferences or as securities, shall be reckoned to be of the date of the intimation or delivery, or other act requisite for completing the same, without prejudice to their validity or invalidity in other respects.

19. The same statute, in section 79, enacts that the whole heritable estates belonging to the Bankrupt in Scotland, shall by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to, and vested in him for behoof of the

creditors absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, to the same effect, as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment, and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of sequestration, and as if a poiding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible.

SECTION V.

ADJUDICATION FOR DEBT.

An Adjudication, until it becomes irredeemable, is merely a Pignus Prætorium, or Judicial Security, and not a Sale under Reversion.

I.—MACKENZIE v. ROSS AND OGILVIE.

RODERICK MACKENZIE held the estate of Redcastle under the Crown. In 1767, he conveyed it to himself in liferent, and to his son Kenneth in fee, to be held either *a me* or *de me*. Infestment immediately followed upon the precept, by which the property was vested in the son, while the superiority remained in the father. In 1786, the father died, but the son never took any steps to vest himself in the superiority. It remained, therefore, in *hereditate jacente* of the father.

June 1, 1791.

NARRATIVE.

In March 1789, the petitioner, Catherine Mackenzie, adjudged the property of Redcastle as in the person of Captain Mackenzie, and the superiority as being in *hereditate jacente* of his father. In May 1789, she presented a signature in Exchequer, upon which she obtained a charter of adjudication under the Great Seal in July following, and upon this charter infestment followed in her favour on August 4, 1789. On the same day that she was infest in the superiority, she granted a charter of the property in her own favour, upon which charter she was infest also on the same day.

In June 1788, Messrs. Ross and Ogilvie also adjudged the estate of Redcastle. In June 1789, being the term next after that in which Catherine Mackenzie had presented her signature,

MACKENZIE
v.
ROSS and
OGILVIE.
1791.

Messrs. Ross and Ogilvie presented a signature in Exchequer for a charter upon their adjudication, containing a clause confirming Captain Mackenzie's base infeftment in the property. They accordingly obtained a charter of adjudication and confirmation, dated the 6th, and sealed the 8th of August 1789.

A process of ranking and sale was afterwards brought of the estate of Redcastle, in which the question arose, Whether the adjudication of the petitioner, Catherine Mackenzie, or that of the respondents, Messrs. Ross and Ogilvie, was the first effectual one ?

ARGUMENT FOR
PETITIONER.

PLEADED FOR THE PETITIONER.—The superiority and the property of the lands of Redcastle were two distinct feudal estates. The one was in *hæreditate* of Roderick the father, and the other in the person of Kenneth the son. Kenneth was also heir-apparent in the superiority at the same time that he was fiar of the property. As the father disposed the lands to his son, to be held *a me vel de me*, it was competent to convert the base infeftment of property into a public infeftment by confirmation from the Crown, which would have extinguished the intermediate superiority. But while there was no confirmation, the property and superiority remained separate estates ; and if a *medium impedimentum* intervened, they could not be united by confirmation.

The rights of the estate of Redcastle stood in this position when the competing adjudications were led. Roderick the father having died a vassal of the Crown, all right to the lands as held of the Crown remained in *hæreditate* of him. The petitioner having adjudged Roderick's right, she was entitled to go to the Crown and demand a charter of adjudication. She applied accordingly, and obtained a charter, on which she was infeft before the respondents obtained their charter of confirmation. The petitioner was thus vested in the superiority, and her adjudication and infeftment constituted a *medium impedimentum*, which barred the confirmation obtained by the respondents. The same superiority could not stand in the person of Roderick the father, and Kenneth the son, at one and the same time ; so neither can it stand in the person of an adjudger of the father's right, and an adjudger of the son's right. In conse-

quence of the right obtained by the petitioner, the Crown was not the true superior of the base infeftment, which was in the person of Kenneth Mackenzie. The charter of adjudication, therefore, in favour of the respondents was void.

MACKENZIE
v.
ROSS and
OGILVIE.
1791.

The plea urged by the respondents is, that the petitioner's charter and infeftment could be no impediment to a confirmation of Kenneth's base fee, because an adjudication is only a right in security, and that nothing could be an impediment to a confirmation but a right which carried off the *dominium* of the superiority in another channel. An adjudication, however, is not a mere right in security, but a proper sale under reversion. The principle on which this doctrine is founded is thus explained by Lord Kilkerran, in the case of RAMSAY v. BROWNE, December 1, 1738. "Upon examining the nature of an apprising, it was judged to be a proper sale under redemption, whereby the land, which descends to the heir, comes in place of the debt, which no more exists as to either principal or annualrents; whereas, if it were a *pignus prætorium*, or a legal disposition in security during the legal, which had been the common notion, then the debt still subsisting till expiry of the legal, the appriser dying within the legal, the bygone annualrents of it would fall to his executors."

An adjudication becomes an irredeemable right of property by the expiring of the legal. But this necessarily supposes that it is a redeemable right of property from the beginning, and not a mere right in security. This unquestionable quality of adjudication, that it becomes an irredeemable right by the expiry of the legal, is sufficient to show that an infeftment upon it must be a complete bar to a confirmation which is intended to carry off the superiority adjudged.

Any intermediate infeftment flowing from the superior, must be a *medium impeditum* to a confirmation taking place. The effect of confirmation is to make the infeftment confirmed a valid infeftment, as flowing from the superior from its date, by a legal fiction, as if the superior had then granted warrant for taking it. To make room for this fiction, it is necessary that nothing inconsistent with it should have happened in the interim; or, in other words, that there should be no mid-impediment. But if the superior has granted in the interim any other

MACKENZIE
v.
ROSS and
OGILVIE.
1791.

infestment on a right flowing from the vassal last infeft, it is impossible he can afterwards confirm a base infestment so as to make it a public infestment flowing from himself. He cannot make inconsistent and contradictory infestments to subsist together. The law will not permit it, as it would involve all legal rights in confusion.

There could be no valid confirmation, therefore, in favour of the respondents. It was effectually barred by the adjudication and infestment obtained by the petitioner. Captain Kenneth Mackenzie never was the immediate vassal of the Crown, and the intermediate superiority was effectually carried by the petitioner's adjudication, on which infestment followed prior to the confirmation obtained by the respondents. The respondents' adjudication of the property is, therefore, ineffectual; and the petitioner having been infeft in the property on a charter granted by herself, her adjudication is the first effectual adjudication both as to the property and the superiority.

ARGUMENT FOR
RESPONDENTS.

PLEADED FOR THE RESPONDENTS.—The plea of the petitioner is, that by her adjudication and Crown charter and infestment thereon, she obtained a complete right to the superiority, and having done so prior to the charter of adjudication and confirmation expedite by the respondents, there was a *medium impedimentum* which barred any confirmation of the base infestment of Kenneth Mackenzie. At the time, however, that the respondents presented a signature in Exchequer, no *medium impedimentum* which could preclude the Crown from granting the charter of adjudication and confirmation applied for, existed, and, in fact, no *medium impedimentum* exists even now.

What the law considers a *medium impedimentum* to a disponent who has been infeft base, obtaining a charter of confirmation from the superior for rendering his infestment public, is not an adjudication, or a mere right in security, whether real or voluntary, which may have been obtained from or against the disponent. The *medium impedimentum* which the law has in view, is the right to the *dominium* of the superiority divesting the disponent, and investing the person acquiring such right, so that nothing should thereafter remain in him to become the subject of a second feudal investiture. By a security, whether

voluntary or legal, obtained against the disponent, a mere incumbrance upon the subject is created, and the disponent is not thereby denuded, but remains to all intents and purposes vested in the right of superiority, which he might convey away to third parties.

MACKENZIE
v.
ROSS and
OGILVIE.
1791.

A creditor by heritable bond and infeftment, or an adjudger infeft, does not become superior of the subjects contained in the security, at least during the legal, and he is not entitled to enter vassals. His right is a mere incumbrance and security, to which extent it may be preferable, but which can never constitute a right of property in competition with others holding rights of property in the same subject. Captain Mackenzie, who stood infeft in the lands upon the precept contained in a regular and irredeemable disposition thereof from Roderick, his father, was entitled both to the property and superiority of the lands conveyed, and by obtaining a confirmation from the Crown who was the superior, he might have vested the superiority as well as property in him. No security or incumbrance created by his father, the disponent, before confirmation, could prove an impediment to his completing his right in terms of his father's conveyance. By not denuding his father, the debts or securities, followed by infeftment, no doubt became burdens upon him. But this was all. The creditor incumbrancers had neither right nor interest to prevent him competing his titles in whatever manner he was entitled from the nature of them.

The petitioner accordingly is sensible that this is the case, and she therefore maintains, that the nature of an adjudication is not a right in security, but a proper sale under reversion. Were that the nature of an adjudication there might be more difficulty in the case, because, according to that doctrine, the adjudger would become the proprietor from the date of his adjudication, and the reverser would have merely a personal faculty of redeeming the estate within the legal.

It is no doubt true that appraisings, as they were introduced by the Statute 1469, were considered to be sales under reversion. Originally, as much only of the debtor's lands was appraised and made over to the creditor as was held to be equivalent to the debt on which the appraising proceeded.

MACKENZIE
ROSS and
OGILVIE.
1791.

But the law in this respect has long undergone a total and material alteration. Adjudications are now led against a debtor's *whole* estate for payment of any debt, without observing any measure between the extent of the debt and the value of the land adjudged. Such a diligence cannot possibly be considered as a sale for a just price. It would be unjust to consider it anything better than a *pignus prætorium*, or legal security for the debt. The Act 1671, cap. 6, considers it in that light, enacting that appraisers shall be accountable for their intrusions within the legal, first in extinction of the interest, and thereafter of the capital, which in effect is declaring the property to remain in the debtor, as no man is bound to account for rents that are his own. The same statute leaves it optional to the appraiser to possess, or not to possess the subject appraised, which is likewise inconsistent with the idea of its being a sale of the subjects adjudged.

An adjudication, considered according to its established nature, is no more than a security. By adjudication the creditor does not become proprietor or superior of the subjects adjudged. He cannot enter vassals. The petitioner had therefore no right to infeft herself in the property, and it was competent for the respondents to apply to the superior for a confirmation of the base infeftment in the person of their debtor.

If, however, an adjudication was to be considered as of the nature of a sale under reversion, so as to constitute a bar to confirmation, it is clear that that impediment could only be created from the moment that infeftment had been taken upon the adjudication. A legal sale under reversion can have no stronger effect than an absolute disposition granted by a party who had previously disposed his estate to another, to be held of his superior. In such a case, it is infeftment only that can bar the first disponee's right of applying for a confirmation. Infeftment was taken by the petitioner on her charter of adjudication on August 4, 1789. But the respondents' signature was presented in Exchequer, upon July 22, 1789, at which time there was no infeftment following upon the petitioner's adjudication of the superiority. The presenting of the signature is all that the law requires in a question re-

lative to the first effectual adjudication. It follows, therefore, that there was no impediment to the diligence pursued by the respondents, even if an adjudication had been a right of that nature, which when completed, might have barred their confirmation.

MACKENZIE
v.
ROSS and
OGILVIE.
1791.

LORD JUSTICE-CLERK BRAXFIELD, Ordinary, found,—“ That the adjudication at the instance of Catherine Mackenzie is the first effectual adjudication *quoad* the superiority of the lands ; but that the adjudication at the instance of Messrs. Ross and Ogilvie is the first effectual adjudication *quoad* the property of the lands.”

Interlocutor of
Lord Ordinary,
Dec. 21, 1790.

The Lords adhered to the Lord Ordinary's interlocutor.

JUDGMENT.
June 1, 1791.

In the Faculty Reports it is stated,—“ The Court were unanimously of opinion, that the adjudication of the superiority by Mrs. Mackenzie was no bar to the subsequent confirmation obtained by Messrs. Ross and Ogilvie, and they were equally clear that the infetment by Mrs. Mackenzie to herself was quite unauthorized.”

LORD ESKGROVE observed,—“ Messrs. Ross and Ogilvie's mode was confessedly formal. The objection is *à medium impedimentum*. I think an adjudication against the reverser does not totally denude him. It is a mere security during the legal. If it divested him, how could a second adjudger carry any thing ? The reverser votes at elections, and enters vassals. One adjudger cannot enter another during the legal as vassals, as little could the petitioner enter herself. I think she had no right to give such a charter, and that the title of the respondents is right.”

OPINIONS.
MS. Notes, Ba-
ron Hume's
Session Papers.

LORD PRESIDENT CAMPBELL,—“ Is anybody of a different opinion ? I am not.”

On the Session papers in the case, President Campbell has written,—“ The question is, Which of two adjudications is the first effectual one ? Both methods of making up titles to the superiority are supposed to be good. Then *prior tempore portior jure*. But the petitioner keeps out of view the date of the respondents' signature. The nature of an adjudication, and the effect of the first signature, are well explained in the answers, and the interlocutor seems to be clearly right. Had the

MS. Notes, Sir
Islay Camp-
bell's Session
Papers.

MACKENZIE
v.
Ross and
OGILVIE.
1791.

charter from the Crown proceeded on a procuratory in a voluntary disposition, this might have been an effectual *medium impedimentum*, as leaving no right to be confirmed. But a charter of adjudication obtained by a creditor, operates only on the interest of that creditor, without exhausting the whole right; and, therefore, it may still be competent for another creditor to complete his right by another method equally feudal; and the respondents' signature being the first proper one, must be effectual."

MS. Notes,
Baron Hume's
Session Papers.

BARON HUME has written on his copy of the Session Papers,—
"A charter of adjudication by a creditor operates only as to the interest of that creditor, and does not hinder another creditor to follow the same method. In short, it does not exhaust the debtor's right as a charter or voluntary disposition does. It is a mere incumbrance. This was the view of the President and Eskgrove, and the ground of refusal."

II.—GRINDLAY v. DRYSDALE.

July 4, 1838.
NARRATIVE.

In 1827, the pursuer purchased the patronage of West Calder, and obtained a disposition on which he was infeft. In 1828, a creditor adjudged the right of patronage from him, and in 1830, the defender purchased from that creditor his right of adjudication, and thereafter expedite a charter of adjudication on which he was infeft. The day after his infeftment, he executed in favour of a party a presentation, as assistant and successor, and the incumbent having shortly afterwards died, he executed a second presentation in the same party's favour. The day after this second presentation was executed, the pursuer executed a presentation in favour of another party.

The competing presentations were given in to the Presbytery, who delayed proceedings until the rights of parties should be determined by the civil courts. For this purpose the pursuer raised an action of reduction of both the presentations executed by the defender. The validity of these presentations depended

upon the question, Whether the right of presenting to a vacancy arising during the currency of the legal was in the reverser or the adjudger ?

GRINDLAY
v.
DRYSDALE.
1838.

PLEADED FOR THE PURSUER.—The effect of an adjudication is not to constitute in the person of the adjudger, a right of property or sale under reversion. It constitutes only a *pignus prætorium*, or security for the debt for which the adjudication is led. An adjudication is merely a temporary burden on the property. All the rights as far of the property remain vested in the person of the debtor. His right is only burdened with the adjudger's infestment, and the burden is extinguishable by the mere act of payment to the adjudger. Though completed by charter and infestment, an adjudication is *ipso facto* extinguished by payment or by intromission. The debt for which the adjudication is led is thereby extinguished, and consequently the adjudication itself, which was only a security for the debt, is also extinguished. The reverser continues vassal, and the casualties of superiority fall in his person, and it is the reverser, and not the adjudger, who alone has power to enter vassals. It is also the reverser, and not the adjudger, who, under the Act 1681, is entitled to vote as a freeholder, and this was not a special enactment to that effect, but one declaratory of the common law. When the reverser dies his heirs make up titles, not by general service as to a mere right of reversion, but by special service, retour, and infestment in the lands themselves. This implies that the right of property remains with the reverser, and that the property is only burdened with the adjudication, as a *pignus prætorium*.

ARGUMENT FOR
PURSUER.

If, then, the right of property is not transferred to the adjudger, the privilege of presenting to a church is not one of those uses to which an adjudger is entitled in virtue of his right of possession. The sole object of the possession of the adjudger is to pay the interest of his debt, and everything possessed by him must be put to the credit of the reverser. A right of patronage possesses a pecuniary value. It is, therefore, a proper subject of adjudication. An act of presentation, however, has no pecuniary value. It, therefore, cannot fall under the adjudger's right of possession, because it does not go to diminish

GRINDLAY the debt, so as to lessen the amount necessary to redeem the
 v.
 DRYSDALE. adjudication.

1833.
 ARGUMENT FOR
 DEFENDER.

PLEADED FOR THE DEFENDER.—Adjudication is the only mode of judicial and compulsory transference of heritable property. A decree of adjudication supplies in law the want of a voluntary conveyance from the debtor. Where the adjudication is completed by entry with the superior, the creditor holds the subjects adjudged in the character of proprietor, subject only to the right of redemption competent to the debtor, upon extinction or payment of the debt for which the adjudication was led. The investiture of the adjudger in the character of proprietor implies an equally complete divestiture of the debtor of his right of property, leaving him merely the privilege of recovering his property within the limited period allowed by law for that purpose. An adjudication, therefore, when completed, as in the present case by charter and sasine, operates a valid transference of the property. The right of the reverser to vote as a freeholder, rests entirely on the express words of the Act 1681, conferring the privilege, and there is no trace of its prior existence.

If, therefore, an adjudication is a proper sale under reversion, then it follows that the adjudger alone, as proprietor for the time, is entitled to exercise the right of patronage. But even if the nature of an adjudication were different, the adjudger is unquestionably entitled to enter into possession of the subjects adjudged. All kinds of heritable rights, though yielding no pecuniary fruits, as the right to honorary heritable offices, may be adjudged. The possession of a right of patronage consists mainly in the act of presentation. It is incorrect to allege that an adjudger can exercise no privilege which is not of a pecuniary value. An adjudger in possession of lands is entitled to enjoy the servitudes attached to the property. He is also entitled to exercise a right of patronage, because, in regard to a right of patronage, the exercise of the right truly constitutes the possession of it.

NOTE OF LORD
 ORDINARY.

LORD MONCREIFF, Ordinary, reported the cause to the Court. In a Note he observed,—“The Lord Ordinary holds it to be quite clear in law, that the modern adjudication, though com-

pleted by charter and seisin, continues, during the legal term of redemption, to be nothing more than a *pignus prætorium*, and not a right of property, or actual sale under reversion. It had this character at an early period, and in the course and practice of the law, it has always become more and more decidedly of this nature. The parties may find advantage in considering the note of Mr. Brodie on the subject, in his edition of Stair, p. 467.

GRINDLAY
v.
DRYSDALE.
1833.

“But though this point settles a principle of importance in the question, it does not exhaust it. For still there can be no doubt that the adjudger is entitled to enter into possession of the subject adjudged. In so far as the subject may yield fruits or profits of a patrimonial value, which can be imputed in extinction of the debt, he has clearly a right to draw them. But if he may enter into possession, has he, or has he not an exclusive right to exercise whatever personal privileges may be connected with such possession? And in such a right as that of patronage, which in its main substance consists in such a personal privilege, has he the power of presentation? This is the question.

“It is clear that the reverser is not divested; for he is still the vassal, and the casualties fall in his person. It is also clear that all personal privileges do not pass to the adjudger. It is clear law that the reverser alone can enter the vassals holding of him. It is also clear that if he has a crown holding, he alone could vote as a freeholder: and the Lord Ordinary is of opinion that this right was not created by the Act 1681, but followed from the principle that he continues the true vassal. See, in explanation, Bell’s Election Law, p. 147, &c.

“On the other hand, it is clear that heritable offices, even such as produce no emoluments, may be adjudged. The Lord Ordinary has not been able to find a case in which it has been found that the adjudger was entitled or not entitled to exercise the function of such an office during the legal. But he recommends to the parties to examine all the cases of this kind. It can scarcely be doubted, however, that there are some personal privileges, which the adjudger, entering into possession otherwise, would be entitled to exercise,—such as traversing the ground, hunting, using the servitudes,” &c.

GRINDLAY

v.

DRYSDALE.

1888.

JUDGMENT,
July 4, 1888.
OPINIONS.

The Court decerned in favour of the pursuer.

LORD GLENLEE observed,—“ This case depends on the point, whether an adjudication is to be considered a sale, completely transferring the property, subject to a right to redeem, or whether it is a *pignus prætorium*, which is quite a different thing, and in which view the adjudger is not entitled to exercise any act putting an end to the use of the subject. Originally a comprising, on a comparison of the value of the property comprised with the debt, was not only considered, but really was an absolute transfer in fact, and in that state of matters an absolute sale under reversion ; but before the Act 1672, it had come to be viewed in a different light, as it had become the practice to adjudge the whole property of the debtor, without any comparison of its value with the debt. The clause in the Act 1661, allowing the reverser to apply to the Court to appoint a locality to the compriser, proportionate to his debt, of which he might be put in possession, confirms that, and the clause expressly stipulates that it should be without prejudice to the reverser's right ; and accordingly, in the case of Wilson, it was held that the adjudger could not remove the reverser from the mansion-house during the legal, because it was shown that the adjudger possessed enough otherwise for the debt. This shows it was then considered a *pignus prætorium*, and that the absolute right of the adjudger did not emerge till the legal expired.

“ So in the case of Wade. Marshal Wade had disposed to his two natural sons, ‘ all and whatsoever debts and sums of money, real or personal, due to him by any person or persons in Scotland,’ and his heir contended that this did not carry certain adjudications of the estates of the York Buildings Company, in which the Marshal had been infeft, on the ground that an adjudication truly transferred the property of the estates adjudged, though subject to redemption ; while the natural children maintained that it was merely of the nature of a *pignus prætorium*, totally different from a wadset, and that the debt still remained a proper debt, carried by the disposition. The Court found that the adjudication was carried, which shows symptoms of its being then considered merely a *pignus prætorium*.

"Then again, as to the Act 1681, we do not see how the right of voting stood before, but we do see that proper wadsetters were allowed to vote, while in adjudications the reversers were to vote. What could the difference have been founded on, but that in the view of the country at the time, there was a total difference between the rights. It may have been thin enough, but they are not the same rights. There is explicit authority that reversers may enter vassals. The case of Ross and Ogilvie is a very strong exhibition of it. There is no doubt of the general rule, that adjudgers during the legal cannot grant precepts to vassals, and it is a very strong analogy as to patronage.

GRINDLAY
v
DRYSDALE.
1888.

"Then, as to the adjudger's right of possession, he is entitled to possess the subject, so far as it may be of use, without diminution of the subsequent value. I do not see how he may not sit in the patron's seat, and draw the teinds, if any, *qua* patron. The presentation could not go, however, to diminish the debt. And there is a great deal in the view, that the possession must be such as will go to diminish the debt, and that the reverser would have as much to pay, in order to redeem the patronage after the presentation, though it would not be nearly so valuable. If it had been adjudged with other subjects sufficient to pay the interest, Grindlay might have called on the adjudger to restrict and to give up the patronage, just as in the case of the mansion-house; and, on the whole, I agree with the views of the Lord Ordinary."

LORD JUSTICE-CLERK.—"I concur; and, after the clear and luminous views stated by Lord Glenlee, it would be a waste of time again to go over the grounds, which are those on which I rest my opinion. I agree that the Act 1681 was to expound the law, and not passed to introduce a new rule."

LORD MEADOWBANK.—"I am of the same opinion, and equity here goes hand in hand with law."

LORD CRINGLETIE.—"I also concur. No act of possession can be allowed that has not the effect of diminishing the debt."

1. "Apprisings and adjudications being legal dispositions and conveyances of the author's infestment, we shall leave them to the next book, where they are considered amongst legal dispositions."—*Stair*, 2, 3, 29.

2. "So much for conventional conveyances of real rights. Judicial conveyances of real rights are competent not by the nature of the right which cannot be alienated without consent of the owner, and in the case of infestments holden of the superior, without his consent, who is not obliged to receive any to be his vassal, but the heirs and successors of the first vassal, provided in the first investiture; and though the investiture bear also the vassal's heirs and assignees, yet the superior cannot thereon be compelled directly to receive a singular successor, assignees being only meant, such assignees to whom the dispositions should be assigned before infestment thereupon. But law hath introduced, in favour of creditors, judicial conveyances, requiring no consent, but the authority of law; which hath also its foundation in natural equity, by which, as obligations are effectual for execution of what is thereby due, so if there were no positive law nor custom, the creditor might exact, either what is due in specie, or the equivalent. The judicial transmission of moveables is by poinding, which being a legal execution, we shall leave it to that place. Arrestment, and the action for making forthcoming, do also transmit moveables, but is rather proper to personal rights, and so

is competent against the havers of moveables, by reason of that personal obligation of restitution, which is upon the haver to the owner, besides his own right of property."—*Stair*, 3, 2, 13.

3. "Infestments upon apprising or adjudication, when formally perfected, do require charters to be granted by the superiors of the apprised lands or other real rights."—*Stair*, 3, 2, 21.

4. "An infestment in security being really a pledge, it is consistent with the infestment of property in the debtor, as two distinct kinds of rights, and thereby the debtor is not denuded, even although the infestment for security were public by resignation; because it is not a resignation simply *in favorem*, but *ad effectum*, namely, for security; and, therefore, when the debt is satisfied, the debtor needs not to be reinvested, but his former infestment of property stands valid. Like unto these in all points are infestments upon apprising, which are truly *pignora pratoria*, whereby the debtor is not denuded, but his infestment stands; and if the apprising be satisfied within the legal, it is extinguished, and the debtor needs not to be reinvested, and therefore he may receive vassals during the legal; and if he die, the apparent heir intromitting with the maills and duties during the legal, doth thereby behave himself as heir, which holds also in adjudications by the late Act of Parliament, now come in place of apprisings."—*Stair*, 2, 10, 1.

5. "Apprisings or adjudications during the legal are extinct, in any

way that the sums whereon they were led become extinct, and need no reinvestiture of the debtor."—*Stair*, 1, 18, 6.

6. "Apprisings are elided by payment without necessity of renunciation, resignation, or reduction, as in the case of other infeftments. The reason is, because apprising being but a legal diligence for security of the sum, which ceasing, it falls with other solemnities, and the debtor's own infeftment stands valid without renovation."—*Stair*, 3, 2, 38.

7. "Apprising, while it is redeemable, is but a legal diligence for security, and the appriser may relinquish the same though he be in possession, and may do any other diligence for recovering his debt; but if he continue to possess after the apprising becomes irredeemable, the debt is thereby satisfied and extinct."—*Stair*, 3, 2, 44.

8. The true nature of an adjudication is well brought out in the case of *MACKENZIE v. ROSS* and *OGILVIE*, and clearly demonstrates that an adjudication, until it becomes irredeemable, is nothing more than a *pignus prætorium*, or judicial pledge. The case involved two points; and the opinion of the Court with regard to both was in conformity with the true nature of an adjudication. One point was, that although the adjudger was infeft in the superiority, she was unable to enter vassals; and that, therefore, her own infeftment in the property was inept. The other point established was, that an adjudication is so completely of the nature of a security or incum-

brance, and not of the nature of a right of property, that the adjudger's infeftment in the superiority was no bar to the Crown confirming the base infeftment in the person of the debtor, and which had been adjudged by another creditor. Had the first adjudger's infeftment in the superiority been other than a mere security, the confirmation by the Crown could not have been valid.

9. *BARON HUME* in his Lectures thus described the nature of an adjudication for debt:—"As to the nature and character of the adjudger's right, there has been a difference of doctrine among our lawyers, if we consider the alterations which have taken place in the consideration of this diligence. Formerly, an apprising was just a judicial sale or pointing of an heritable estate, it was an absolute judicial sale, of as much of the land as would pay the debt. After the introduction of the power of redemption by 1469, it still continued to be a sale, but under reversion. The appriser enjoyed the rents of the lands during the time he possessed them, and on their redemption he received the principal of his debt. This right to the lands was not more liable to be extinguished by intromissions, than the right of property in the debtor himself. The diligence put an end to the debt, or personal claim, and put the property of the lands instead of it.

10. "Such was the original character of the apprising, but it underwent a material alteration by 1621, c. 6, which instituted an

accounting between the reverser and adjudger, and set off the rents against the interest, and made the surplus of the rents be imputed in payment of the principal sum. From this time forward an apprising could not be regarded as a right of property; because now it could be extinguished by the intromissions of the possessor. It assumed the nature of a pledge for money like an improper wadset. Farther innovations were made by 1661, c. 62, and by the institution of general adjudications by statute 1672. In the course of that century, the ideas of lawyers on this subject began, of course, to alter. Stair says, this adjudication is of the nature of a *pignus prætorium*, or security only. The decisions of the Court came also to be affected, and they have departed from the original notion of property, to that of a claim of debt with an accessory security constituted by adjudication, which could not be done if the adjudication were considered as a right of property.

11. "But some of the old conceptions still remain. While adjudication was regarded as a sale of lands under reversion, which extinguished the personal obligation, and put the land in its place, on that principle, in point of succession there could be no separation between the accumulated or principal sum, and after interests, the whole right, accunulation and all, would go to the heir, and nothing to the executor. Notwithstanding the change in the nature of the right, this practice has been so

firmly fixed, that our Judges have not deviated from it." — *Hume's Lectures, MS. Notes, Adv. Lib.*

12. In the case of *COCHRANE v. BOGLE*, March 2, 1849, the true nature of an adjudication was again brought under the consideration of the Court. The pursuer held an estate under an entail defective in regard to the prohibition against sales, but valid in regard to the prohibition against contracting debt. A personal creditor of the former heir had adjudged the estate, and also the power to sell the estate, which was alleged to be in the debtor. A charter of adjudication was obtained, and infetment followed. The debtor immediately thereafter died, and the next heir brought a reduction of the adjudication and the infetment following upon it. One of the grounds urged by the pursuer was, that an adjudication was nothing more than an heritable security for the debt in respect of which the lands were adjudged, and that, as all debts were struck at by the prohibition in the entail, all heritable securities as accessories of the debt fell to be reduced.

13. LORD MONCREIFF observed,—“The only question remaining is—Is adjudication equivalent to a sale? I am clear that it is *not*. Whatever the old apprising may have been in theory, I am clear that a decree of general adjudication in modern law is no more than *pignus prætorium*,—a step of diligence, which only creates a security for debt. It is not the act of the debtor, but a security taken by the act of the law. The

debt remains unpaid. The security may be abandoned, and other remedies taken. The debtor is still the vassal. Even Erskine's doctrine, taken with his qualifications, does not give a different result. The other authorities are clear; such as President *Campbell—Eskgrove—Bell—Hume*, and all the late cases, particularly *Drysdale, Mackenzie, &c.* The cases as to special points, — *Interests—Prescription* — are easily explained, though perhaps not consistent in principle. But they do not alter the fixed general rule. They arose from an unwillingness in the Court to disturb such special matters which had been fixed in practice." In this opinion of Lord Moncreiff a large majority of the whole Court concurred.

14. The judgment in the case of *MONRO v. MACKENZIE*, January 27, 1756, would not now be followed by the Court. In that case, the estate of Tulloch was adjudged, in 1736, by Mackenzie of Seaforth, who expedite charter and sasine in 1744. This was the first effectual adjudication on the estate, and no other was led within year and day of it. Two other adjudications were led in 1743, and two in 1747, but no infestment followed upon any of them. After these a fifth adjudication was led by Sir Henry Munro, which, in 1748, was completed by charter and sasine. The question raised was—Whether the four adjudications which still remained personal rights, were to be preferred in their order next after the first effectual adjudication; or whether

the adjudication by Sir Henry Munro was preferable to the four adjudications, in respect that charter and sasine had been expedite upon it?

15. The four adjudgers *pleaded*, — An adjudication is a proper sale under reversion, and not merely a *pignus prætorium*, or right in security. If that be established, it necessarily follows, that the debtor being denuded in favour of the first adjudger by charter and sasine, nothing remained with him but a right of reversion competent to be exercised within the legal. This right, therefore, was effectually carried by the adjudication without infestment. Sir Henry Munro *pleaded*,—A debtor is not denuded of the *jus proprietatis*, or right of fee, by an adjudication being led against him, an adjudication being no other than a right in security, or *pignus prætorium*, notwithstanding whereof the property remains with the debtor. He farther *pleaded*, that the Act 1661 could not affect the question, as none of the competing adjudgers were within year and day of the first effectual adjudication, and that therefore the question at issue between the posterior adjudgers fell to be determined as if the Act 1661 had never been passed. The Court preferred the adjudications according to their dates, notwithstanding the infestment upon the adjudication at the instance of Sir Henry Munro. It may, however, be confidently affirmed, that a similar judgment would not now be pronounced by the Court, for the ground upon which the Court then

proceeded would not now be sustained. LORD KILKERRAN states that the judgment proceeded "upon the single *medium* that nothing was left with the common debtor but a personal reversion." But if that *medium* is withdrawn, the judgment cannot be sustained, as it would be opposed to the rule of law which regulates the preferences of heritable rights, that the date of the recorded infeftment, and not the date of the conveyance, is the criterion of preference. The statute 1661, cap. 62, did not affect the question raised, as that statute relates only to adjudications prior to or within year and day of the first effectual adjudication.

16. LORD KILKERRAN himself seems to have dissented from the judgment, for his own opinion is stated in his MS. Report to the Court, which is still preserved along with his Session Papers. In that Report he observes,—"*First*, Originally, no doubt, apprisings were proper sales, because no more lands were conveyed to the appriser than what paid his debt; and he was not accountable for his intromissions during the legal. But how soon the law was in this respect altered, that there was no proof of the value of the lands, that great estates were appraised for small sums, and the appriser made accountable for his intromissions, which, if they exceeded the debt, the apprising was extinguished, it no more could remain of the nature of a sale, it being inconsistent with the nature of this, that a right of property can be extinguished. *Secondly*,

As the law now stands, if an appriser do not intromit, the rents belong to the reverser, how can that be reconciled with the notion of its being a sale, as originally it was, and that an appriser is proprietor of the lands, and not a creditor? Our statutes are not intended to settle abstract points, that is left to be gathered from the points established to be law in our statutes; and it seems plain, that the points now established to be law, necessarily infer an alteration of the constitution of an apprising, from a sale under redemption to a disposition in security of the debt; for how otherways is it possible that the apprising can be extinguished by possession, or that the rents belong to the reverser, where the appriser does not intromit? *Thirdly*, Do not casualties fall by the death of the reverser, and not by the death of the appriser during the legal? For what reason? No other than that the appriser is only a creditor, and not proprietor within the legal. *Fourthly*, Of old while apprisings were rights of property, the appriser could not enter in possession till he was infeft, for the superior behoved to have a vassal, and was entitled to a year's rent for change of his vassal. But how soon the nature of an apprising was changed, the appriser was allowed to possess without infeftment, as the fee remained full by the infeftment of the reverser. *Fifthly*, The express authority of an Act of Parliament, that an apprising within the legal is but a *pignus prætorium*. I mean the Act 1681, concerning

the election of commissioners for shires, and where the distinction is put between proper wadsets, and apprisers within the legal."

17. By the Act 10 and 11 Vict., cap. 38, it is declared to be no longer necessary that a summons of Adjudication or of Ranking and Sale should be preceded by a bill, and such bill is accordingly abolished. The same Act declares that it has been found inconvenient in practice to libel and conclude for general adjudication of lands, as the alternative only of special adjudication, in terms of the Act 1672. It therefore enacts that it shall no longer be necessary to libel or conclude for special adjudication, and that it shall be lawful to libel and conclude and decern for general adjudication without such alternative.

18. On the preamble that a party who has obtained decree of Adjudication or decree of Sale is frequently exposed to inconvenience from the delay which may occur in obtaining infeftment, the same statute enacts that it shall be lawful for the Judges of the Court of Session, when pronouncing decree of adjudication, whether for debt or in implement, or decree of sale, to grant warrant for infefting the adjudger, or purchaser and his heirs and successors, in the lands and others contained in the decree, to be holden by them alternatively, by two several infeftments and manners of holding.

19. In virtue of such decree, the adjudger or purchaser is entitled to complete his title, by obtaining a charter of adjudication or of sale

from the superior of the lands, and passing infeftment thereon. Where also the person adjudged from is entered with the superior, or in a situation to charge the superior, under the powers contained in the Act, to grant entry by confirmation, the adjudger or purchaser may complete his title by taking infeftment in virtue of the warrant contained in the decree of adjudication or of sale.

20. Infeftment taken upon this warrant, along with the decree of adjudication, or of sale, forms an effectual feudal investiture in the lands adjudged, holding base of the party adjudged from, and his heirs, until confirmation thereof shall be granted by the superior. The effect of such an infeftment is the same as if the party adjudged from had granted a disposition of the lands to the adjudger or purchaser, in terms of the decree of adjudication, or of the decree of sale, with an obligation to infeft *a me vel de me*, and a precept of sasine, and as if the adjudger or purchaser had been infeft on such precept. The effect of a charter of confirmation of the sasine, proceeding upon the decree of adjudication, or decree of sale, is to make the adjudger or purchaser hold the lands immediately of and under the superior.

21. The right of the superior to the composition payable by the adjudger or purchaser, as due under the existing law, is reserved entire, and the adjudger or purchaser, by taking infeftment on the decree of adjudication or of sale, becomes indebted in such

composition to the superior, and he is bound to pay the same on the superior's tendering a charter of confirmation, whether the charter be accepted or not, and the superior is entitled to recover payment of the composition.

22. The infestment taken in virtue of the warrant contained in the decree of adjudication, when duly recorded, is, without prejudice to any other diligence or procedure, of itself sufficient to make the adjudication effectual in all questions of bankruptcy or diligence. In those cases where the deed, by

which the right of the party adjudged from is constituted, contains a prohibition against infeudation or alternative holding, the decree of adjudication, along with the infestment proceeding upon the decree as its warrant, forms a valid feudal investiture in favour of the adjudger or purchaser, notwithstanding any such prohibition, without prejudice, however, to the right of the superior to require the adjudger or purchaser to enter forthwith, and to deal with him as with a vassal unentered.

An Adjudication, although followed by Charter and Sasine, if not accompanied with possession, is lost by the Negative Prescription.

ANDERSON v. NASMYTH.

March 8, 1758. IN 1682, James Hamilton adjudged certain lands from James Nasmyth, and in 1683 he was infest upon a charter of adjudication from the superior. In 1718, John Crawford adjudged this adjudication from the heirs of James Hamilton, and in 1739 the pursuer adjudged this last adjudication from Crawford's heirs.

NARRATIVE.

In 1690, the grandfather of the defender adjudged the same lands from the said James Nasmyth, and in 1735 the defender was infest upon a charter of adjudication from the superior. In 1756, the pursuer brought a reduction of the defender's title. The defender pleaded that the pursuer's adjudication was lost by the negative prescription.

ARGUMENT FOR PURSUER.

PLEADED FOR THE PURSUER.—It is not competent to plead the negative prescription of Hamilton's adjudication in 1682, and the charter and sasine thereon in 1683. As that adjudi-

cation was long ago expired, James Nasmyth, the proprietor, was thereby denuded, and a right of property was thereby acquired by Hamilton. It is, therefore, incompetent to object the negative prescription to the pursuer's right of property, unless the defender has himself acquired a right by the positive prescription. This, however, he cannot pretend to do, as his infetment was only in 1735. There is no such thing as losing property *non utendo*. Property must remain, unless transmitted by conveyances, legal or conventional, or unless acquired by the positive prescription. A proprietor, therefore, however long he may be out of possession, can never lose his property, but may resume the possession whenever he pleases, unless the possessor has acquired a right by possessing for forty years upon a charter and sasine. An adjudication adjudges the debtor's lands in payment of the creditor's debts. By its nature, therefore, it gives a right of property to the creditor in the lands adjudged, redeemable, indeed, within ten years, but irredeemable thereafter, if the debt is not paid within the legal, which is very different from a right granted merely in security of a debt.

ANDERSON
v.
NASMYTH.
1758.

PLEADED FOR THE DEFENDER.—An adjudication in itself is merely a diligence of law. Within the legal, it is obviously no more than a security, although infetment may have followed upon it. The presumption of law is, that as adjudications within the legal are rights in security, so even without the legal they continue to be rights in security, and remain of their former nature, unless the party, who is entitled by particular laws to convert them into a right of property, shows his intention to take advantage of these laws by some overt act. The law of itself does not, in a moment, transmute what, within the legal, was a right of security, into a right of property, after the legal is expired. But it allows the creditor to make this transmutation. It presumes the diligence of adjudication to retain still its primary nature, but it allows this presumption to be thwarted by the creditor, and if he neglects to do so for forty years, he loses his right to do so at all.

ARGUMENT FOR
DEFENDER.

It is observed by Lord Stair,—“That infetment upon an adjudication remains but as a security which the appriser may re-

ANDERSON
v.
NASMYTH.
1758.

nounce, or make use of other securities till he be satisfied, and the like though after the legal was expired." And in taking notice of the decision, *Scarlet v. Robertson*, December 7, 1631, his Lordship observes specially,—"*But here the appriser had attained no possession.*" From this, it is plain that his Lordship makes the possession or no possession the criterion to constitute the adjudication a right of property or a right of security, because, by not entering into possession, and so waiving his privilege to take the property, he is presumed to keep up the adjudication as a security only upon the property. But further, by the later law, an adjudication cannot pass into a right of property without even a more overt and solemn act than that of possession. The obtaining a decree of the expiry of the legal is also necessary, in order to ascertain with precision whether the appriser intends to transmute the right of security into a right of property, or if he intends to relinquish it, and to keep up his diligence as a security only. The adjudication in question, therefore, being only a security or burden, is, like other securities and burdens, subject to the negative prescription, and the defender, having adjudged the right of reversion competent to the original debtor, and got the possession, may plead every right which his author could plead.

JUDGMENT.
March 3, 1758.

The Lords found Anderson's adjudication prescribed.

1. The case of *ROSS v. MACKENZIE*, in 1776, is thus reported by Tait under the title of Prescription :—"In the cause of Mackenzie of Ardross, and Ross of Auchinacloch, the Lords found 'that a decreet of adjudication, though completed by charter and sasine, may be cut off by the negative prescription, as to some of the subjects which have never been possessed, although it had

been continued in force as to the other subjects upon which possession had followed;' and upon this ground, the heir of the family was preferred to the adjudger with respect to some of the lands under an adjudication, but never possessed by the adjudger, though as to the other lands in the adjudger's possession, the adjudger was preferred."

2. The judgments in this case,

and in that of *ANDERSON v. NASMYTH*, appear to establish these two positions:—*First*, That notwithstanding an adjudication, the right of property continues to subsist in the debtor; and, *Second*, That notwithstanding an adjudication, the right of debt continues to subsist in the creditor. In the case of *ROSS v. MACKENZIE*, accordingly, the adjudication obtained by the creditor was extinguished by the negative prescription, and the right of property in the debtor became disburdened of the debt which had been secured

over the property by the adjudication. The true nature of an adjudication is thus illustrated as being a right in security merely, until the proper steps have been taken to render it an irredeemable right. As soon as all right of redemption on the part of the debtor is foreclosed, the nature of the creditor's right is changed. It then ceases to be a right in security merely, but is changed into an absolute right of property. The steps necessary to be taken to effect this change will appear from some of the subsequent cases.

The Expiry of the Legal does not, ipso facto, vest a Right of Property in the Adjudger.

I.—*CAMPBELL v. SCOTLAND.*

IN 1757, George Gibb adjudged certain tenements in the town of Dundee. The adjudication proceeded upon two heritable bonds, with infestment in the subjects adjudged. Gibb was infest upon his adjudication, and he afterwards conveyed the subjects adjudged to a singular successor. In 1780, the defender adjudged the subjects from the heir of the singular successor, and he was infest in them in 1783.

March 7, 1794.
NARRATIVE.

The debt in respect of which Gibb had adjudged in 1757 was £530, and the total amount of the price which he received on selling the subjects was £483. The debt in respect of which the defender adjudged from the heir of the party who purchased from Gibb was £640.

The pursuer, as the singular successor of the heir of the original reverser, brought a reduction of the adjudication obtained by Gibb in 1757, and also of the adjudication led by the defenders in 1780. The ground of the reduction was, that these adjudications were long since extinguished and paid, by the

CAMPBELL
v.
SCOTLAND.
1794.

intromissions had by the defenders and their authors with the rents of the subjects adjudged.

The Lord Ordinary Dreghorn reported the case, and the Court ordered a hearing in presence on the general question,—
“How far, where an adjudication is liable to no objection, and the debt is not extinguished by intromissions within the legal, a decree of declarator is necessary in order to cut off the debtor’s right of reversion?”

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The question at issue is, Whether the mere expiry of the legal, where no decree of declarator to that effect has ever been obtained by the adjudger or those in his right, is a bar to the present action? It is admitted that the strict letter of the statute 1672 is with the defender. It is also admitted that the writers of the greatest authority upon the law of Scotland have followed the strict letter of the statute, and have laid it down, that by the law of Scotland, after the expiry of the legal, the estate adjudged becomes the absolute and the irredeemable property of the adjudger. Notwithstanding these admissions, it is, however, maintained that there is no rule known in the law of Scotland that will support a creditor adjudger in maintaining that the day after the legal of his adjudication has expired, the estate of his debtor becomes his absolute and irredeemable property. The defenders are bound to point out some decision showing that full effect has been given to the expiry of the legal. The defenders are also bound to explain how a declarator of expiry of the legal came to be introduced into practice. For if the expiry of the legal was, *per se*, an *ipso jure* forfeiture of the right of the debtor, a declarator of the expiry of the legal was a superfluous and expensive form. But such declarators are not only very ancient in the practice of the Court, but exist at the present day. They must, therefore, have arisen from the change of circumstances, whereby the expiry of the legal was rendered so highly unfavourable to the debtor.

Apprisings were originally sales under reversion, in which the sheriff of the shire adjudged to the creditor a parcel of land precisely equal to the sum that was due to him, an inquest being held to ascertain how much land was equivalent to the

debt. In process of time, however, apprisings, instead of being led in presence of the sheriff of the shire, and upon the ground of the lands, and before a jury in the neighbourhood, came to be led in the presence of messengers, as sheriffs in that part, in the Tolbooth of Edinburgh, and before a jury of Edinburgh citizens, totally unacquainted with the value of the estate that was to be appraised. Apprisings thus came to be attended with very different effects from those which were originally intended. The greatest estates came to be appraised, and carried off for mere trifles.

CAMPBELL
v.
SCOTLAND.
1794.

In the case of *CHAMBERS v. OLIPHANT*, March 5, 1766, it was found incumbent on an adjudger to produce the grounds of his adjudication, although possession had followed upon it for more than forty years. In the case of *CAITCHRON v. FLEMING*, March 7, 1769, the plea founded on the expiry of the legal was repelled, and the cause was then turned into a count and reckoning. These and other cases show that the mere expiry of the legal does not vest the adjudger with an absolute right of property. As, therefore, no decree of expiry of the legal was obtained, the adjudication led by Gibb, even if it had been properly and legally deduced, is no bar to the present action.

PLEADED FOR THE DEFENDER.—Three important circumstances require to be attended to in considering the present question. *First*, The legal of the adjudication obtained by Gibb in 1757 expired as far back as 1767. *Second*, The subjects so adjudged by Gibb were publicly sold by him to onerous purchasers, from whom they were again adjudged by the present defender, and the legal of their adjudication, which was obtained in 1780, also expired in 1790. *Third*, Neither of these two adjudications carried off a subject greater, but, on the contrary, one inferior in value to the amount of the debts for which they severally proceeded.

ARGUMENT FOR
DEFENDER.

By the Statute Law of Scotland, it is clearly established, that after the lapse of the legal reversion, the right to the lands adjudged is carried irredeemably to the adjudger. From that period he possesses, not as creditor in a debt, but as proprietor of the subjects adjudged. Originally an apprising was a judicial sale, entitling the creditor to the property of the land for

CAMPBELL
v.
SCOTLAND.
1794.

satisfaction of the sum due to him. By the Act 1649, cap. 36, the faculty competent to the debtor of redeeming the lands within seven years was first introduced. By the Act 1661, cap. 62, the legal reversion was extended to ten years; and this was confirmed by the Act 1672, with regard to general adjudications, which came in place of the former apprisings. All these different Acts of Parliament declare, that unless the lands be redeemed within the specified time, they shall remain heritably and irredeemably with the creditor.

These express enactments of the legislature have suffered an exception with regard to co-adjudgers. With regard to them, it is now established, that the expiry of the legal has no effect, and does not exclude them from their *pari passu* preference. So strongly rooted was the idea of the right of reversion being limited to the terms of years specified in the Statute, that it was long questioned whether even a co-adjudger could have a power to open the expired legal against the singular successor of the first effectual appriser. The doctrine of admitting the co-adjudger, even after expiry of the legal, was not established till the noted case of Barclay of Towie, decided June 23, 1720.

There is evidently, however, a wide difference between the case of a co-adjudger within year and day, and that of the reverser or his singular successor. In the former case, the adjudication resolves into a simple security, as if the legal were not expired, whereas, in the latter it is an irredeemable right of property. At the same time, it is not disputed that even in a question with the reverser, there may occur circumstances which will entitle him to insist against the adjudger, notwithstanding the expiry of the legal. Originally, apprisings were meant to be a judicial sale or transference of a part of the debtor's lands, precisely equal to the amount of the debt due to the creditor. The abuse, however, crept in of apprising to the creditor the whole lands of the debtor, however inconsiderable the extent of the debt might be. This practice was endeavoured to be corrected by Statutes, but notwithstanding, general adjudications still prevailed.

In consequence of large estates being adjudged for debts of very inferior amount, it necessarily came to appear unjust that

upon expiry of the legal, a creditor should obtain so undue advantage as to acquire the property of an estate far exceeding the amount of debt. In this view, it was held equitable, that even after expiry of the legal, any just ground should be laid hold of for entitling the reverser to redeem the lands. For this purpose, any gross error, or want of formality in the adjudication, has been admitted as a ground for opening the legal. Where also an exorbitant advantage appears to have been taken, and the value of the estate appears to have greatly exceeded the amount of the debt, the Court has from equity admitted this to be a just cause for opening the expired legal in favour of the reverser. It would, however, be unjust to allow the legal to be opened at a great distance of time after the subjects have come into the possession of onerous purchasers, when the amount of debt on which the adjudication proceeded was much greater than the value of the subject adjudged, and where no just defect or informality is alleged to exist in the adjudication itself.

CAMPBELL
v.
SCOTLAND.
1794.

The Lords found—"That the legal does not expire *ipso facto*, and remitted to the Lord Ordinary to hear parties farther on special objections."

JUDGMENT.
March 7, 1794.

LORD JUSTICE-CLERK BRAXFIELD observed,—“The object of the Statute 1681, cap. 17, was to adjust matters among creditors themselves, not with the debtor. Before that statute there were no judicial sales, but creditors must adjudge from debtor, and then divide the lands rateably among themselves, according to their debts. This was very difficult and troublesome; therefore that statute authorizes a sale of the debtor's lands, in order to reduce them into money, which could be easily divided among the creditors. When I consider the whole of the law of Scotland as to adjudications, I think it was the intention of the law, that by the adjudication, the property of the land was to be vested in the adjudger, without the necessity of a decree of declarator of expiry of legal. In 1592, an Act of Sederunt passed, declaring that conventional irritancies were to be strictly interpreted, and this gave rise to all our writers on the law distinguishing between legal and conventional irritancies. I have no doubt that many estates in Scotland have

OPINIONS.
MS. Notes, EL-
PHINSTONE'S
Session Papers.

CAMPBELL
v.
SCOTLAND.
1794.

been carried off by expired legals without any declarator. This is agreeable to what has been said, that by the strict principles of the law, the right of property vested *ipso jure* by the apprising or adjudication in the creditor, without any declarator.

“ But though such was the law, that will not determine this case, which must be decided according to the law as now modified by a long train of decisions of this Court. In cases of conventional irritancies, it has for many years, notwithstanding the Act of Sederunt 1592, been the practice of the Court, not to give effect to conventional irritancies without declarator. In questions on tacks, wadsetts, entails, &c., irritancies have long been allowed to be purged, the Court thereby, much to its honour, modifying the rigour of the law. In the case of Hamilton of Raploch, the Court proceeded on these equitable principles, which were there fully considered, and held that penal irritancies did not *ipso jure* take place, but required a declarator. In like manner, in questions where a superior attempts to carry off his vassal's property *ob non solutum canonem*, and in all such cases, the Court has, by long practice, established that it requires a declarator, and that the irritancy may be purged.

“ On the same principles, an adjudger, after the lapse of ten years, must call his debtor in a declarator, either to pay the debt in the adjudication, or see the lands decerned to be the property of the adjudger in all time coming ; I therefore think a declarator is necessary.”

LORD ESKGROVE observed,—“ The diligence of adjudication is of importance in our law, and I should be sorry to do anything to injure the rights thereby established ; but, on the other hand, we must not allow debtors to be oppressed by their creditors. There is no doubt that apprisings and adjudications, by their original nature, gave a right of property without declarator ; but I see that, without statute, being corrected by practice, to restrain the injustice that resulted from such a law, and, in some degree, the legislature has aided this restriction of the law. The Act 1621 obliged the creditor to account for intromissions within the legal. Then came the Act 1661. It has been well explained by the Justice-Clerk, that even in cases of conventional irritancies, where by agreement of parties it is covenanted

that the right should *ipso jure* vest without declarator, yet now by practice it is allowed to purge the irritancy. We must, therefore, in the case of adjudication, hold, that before declarator, the right of property does not now vest in the adjudger. For a century past, we will not find an instance where an estate was carried off by an adjudication without declarator, though prior to the Statute 1661, we may find many such instances. It has in this case been pleaded, that when a declarator of expiry of legal is raised, the creditor-adjudger is not bound to accept of payment of his debt, though it should be offered by the debtor, but may insist to have the lands adjudged declared to belong to him. I deny that to be the case as the law now stands. It would be a reproach on the law of the country, and contrary to justice if it were so. If such was the law, there should be no declarator ; but I am clear that when a declarator is brought, and the debtor offers to pay, the creditor is bound to receive payment, and depart from his adjudication. In the case of Crichton, we determined, that without a declarator an adjudication did not vest the property in the adjudger."

CAMPBELL
v.
SCOTLAND.
1794.

LORD PRESIDENT CAMPBELL observed,—“ I always consider it as desirable that in questions of law, as little as possible should be left to the discretion of the Judge. The law should be fixed ; and I hope the Court are now to give a decision, never to be altered, fixing this point—That the legal of an adjudication being expired does not, without a decree of declarator, or the express act and consent of the parties, vest the right of property in the creditor, but that, like all other penal irritancies, it must be declared. If the debt were large and the estate small, could a creditor-adjudger be compelled to accept of the lands adjudged in payment of the debt ? I think he could not be obliged to accept of a small estate *in solutum* of a debt above its value. If so, why allow a creditor to carry off a large estate for a small debt much under the value of the lands adjudged ?

MS. Notes.
Elphinstone's
Session Papers.

“ Nothing short of an express Act of Parliament saying, that, after ten years, Courts of Law are not to be at liberty to enter at all upon an investigation of an adjudication, and that, after that period, every inquiry is to be barred, ought to prevent the Court from considering the justice of the case. I can find no such law. None such exists ; and, therefore, I must be of

CAMPBELL
v.
SCOTLAND.
1794.

opinion that a declarator is necessary, and that even after decree of declarator in absence, it is competent to inquire into the merits. It is a mere legal irritancy. The debtors may be abroad, and know nothing of the proceedings. In case of feu-rights, tacks, &c., the practice of the Court now constantly allows the irritancy to be purged. We are here called upon to do the very reverse. I cannot go into that idea. In the case of *Finlayson v. Clayton*, June 1761, the Court would not allow the conventional irritancy to be purged, on account of some strong words in the clause, declaring it should not be purgeable. Although it was there a conventional irritancy, which is always attended with more difficulty than legal irritancies, the decision was not at the time in general approved of. The case here is a legal irritancy, and, therefore, on this point I am for laying down this broad and general rule, that the property of lands is not *ipso jure* vested in an adjudger by the lapse of ten years, but that something more is required."

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

On the Session Papers in the case, LORD PRESIDENT CAMPBELL has written,—“ Apprisings and adjudications have at different times changed their nature, and become different as to their legal effects. Whatever may have been the case of the old apprising, or of the modern special adjudication, it is clear that the general adjudication now in use is not a sale under reversion, but a mere *pignus prætorium*, and to convert it into an absolute right of property, by the mere lapse of ten years, would be a strong and very unjust operation of the law, not agreeable to the analogy of law in any other instance. To say that it is not a penal irritancy, but an eventual transfer, and that the legal reversion was a privilege to the debtor limited to a time, and given under a condition which ought not to be extended, is a mere play upon words ; for in real substance the effect is this,—that an estate, however large, belonging to the debtor, is by a certain form of attachment made over to the creditor for a debt, however small ; or, in other words, from a pledge becomes a right of property by a legal foreclosure of the term, which unquestionably is penal. It would perhaps be some alleviation if, *vice versa*, the creditor for a debt, however large, were obliged, at the expiry of the term, to be content with the estate, however small, *in solutum* of his debt ; but it is admitted

on all hands that he may repudiate the estate, and require his payment.

CAMPBELL
v.
SCOTLAND.
1794.

"A general adjudication being in truth no more than a security for debt, it ought never to have any stronger effect. If it is not followed out in any shape within forty years, it is cut off by negative prescription, which is clear proof that it is not a right of property ; and although followed by possession, it does not become a right of property even by the positive prescription, although it is true that a charter and sasine, the warrant of which was an adjudication, is a good prescriptive title, because, after forty years' possession, it is enough to produce charter and sasine, and to prove forty years' possession.

"In other cases of security for debt, no such thing as an *ipso jure* foreclosure takes place. The *pactum legis commissoriae* was reprobated in the civil law, and is not much favoured with us. It certainly would not operate without declarator, and without giving an opportunity of purging. Yet conventional irritancies are more easily enforced than mere legal ones. At least this is the case with regard to feu-rights and tacks. If a conventional foreclosure could not operate *ipso jure*, it would be singular if a mere legal one could. If a conventional irritancy may be purged, as in the case of wadsets, which are a voluntary pledge, it would be strange if it were otherwise in the case of adjudications, which are a *pignus prætorium* forced upon the debtor by the act of the law, and of which he may even be ignorant.

"In practice, no conveyancer has ever rested upon the expired legal as a good title, without the positive prescription upon charter and sasine ; and it is a point that has seldom been contested. Even Lord Stair treats of adjudications as mere *pignora prætoria* ; and since the introduction of judicial sales, the facility of procuring credit, &c., it would be unjustifiable in any other light."

II.—STEWART v. LINDSAY.

Nov. 28, 1811.

NARRATIVE.

In 1777, John M'Ritchie having obtained decree *cognitionis causa* against the son of his deceased debtor, who renounced to be heir, led an adjudication *contra hereditatem jacentem*. The debt in respect of which the adjudication was led was £135, and was more than the value of the subject adjudged. In 1778, the adjudger obtained a charter of adjudication from the superior, and in 1780 he sold the adjudication and the tenement adjudged to Mr. John Murray for £104. In 1785, Murray, after making considerable repairs on the subjects, sold them to the defender for £131. In 1794, the defender was infeft in the tenement adjudged, in virtue of the precept of sasine contained in the charter of adjudication obtained by the adjudger in 1778, and his sasine was regularly recorded.

When the defender made his purchase in 1785, the subject consisted only of an old dwelling-house. Soon after his purchase he rebuilt the dwelling-house, making it a house of two storeys, instead of one as formerly. The expense laid out by him in improvements amounted to £171.

In 1805, the Duke of Athole having resolved to build a bridge across the river Tay at Dunkeld, the engineer fixed on the defender's tenement for the north abutment of the bridge, and for the road leading to and from it at the north end. It became, therefore, necessary to demolish the whole tenement, and to lay waste the small piece of garden ground belonging to the defender. In order to accomplish the erection of the bridge, the Duke agreed to give the defender £525 sterling, a price considerably higher than the real value of the property even as improved and enlarged.

In 1807, the pursuer, as the heir to his grandfather, who was the debtor of the adjudger, instituted against the defender an action of redemption, declarator, and count and reckoning. The defender's first plea was, that an adjudication *contra hereditatem jacentem*, obtained on the renunciation of the succession by the heir, was not subject to redemption at all, especially after the expiry of the legal, even although no decree of expiry had been obtained.

On advising the cause, the Court were of opinion that this plea, founded on the distinction between an adjudication *contra hereditatem jacentem* on the renunciation of the heir, and an ordinary adjudication, was not sufficient, without a declarator of the expiry of the legal, to foreclose the right of redemption. The Court, therefore, repelled the plea stated by the defender, on the ground of the adjudication proceeding on the pursuer's father's renunciation to be heir, but remitted to the Lord Ordinary to receive a condescendence from the pursuer of the value of the subject in dispute at the date of the adjudication, and of the debts affecting the same, and to proceed accordingly.

STEWART
v.
LINDSAY.
1811.

Dec. 7, 1809.

The pursuer afterwards gave in a minute to the Lord Ordinary, stating, that in order to avoid the trouble and expense of a proof, he proposed to show on grounds of law, that, in whatever way the fact stood respecting the value of the subject, his action of redemption and declarator was well founded. In consequence of the pursuer's minute, the Lord Ordinary appointed parties to prepare Informations.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The pursuer's right of redemption is still open, independently of all objections to the regularity of the adjudication. By the established law of Scotland, the reverser in an adjudication is entitled to redeem his property at any time, even after expiry of the legal, unless the adjudger can show, either that he has obtained a decree of declarator of expiry of the legal, or that he has possessed for the period of forty years upon his adjudication followed by infeftment. This is the established law of Scotland, independently of the comparative values of the subject adjudged, and the debt adjudged for. The defender does not pretend that a decree of expiry of the legal was ever obtained by him or his authors. The precise question at issue, therefore, is, Whether the defender can plead upon his adjudication without either having a decree, declaring the expiry of the legal or any prescriptive title by infeftment, or whether, on the other hand, the pursuer has not a right to redeem by making payment to the defender of such balance as can be shown to be still due for the debt adjudged for.

The law has declared, that payment, or intromission to the extent of the debt, shall, *ipso facto*, extinguish the adjudication.

STEWART
v.
LINDSAY.
1811.

It is easy therefore to see how the process of declarator of expiry of the legal was introduced into practice. The object of the process was not merely to have it declared, that expiry of the legal has taken place, for that would in every case be sufficiently proved by the decree of adjudication itself. The object of the process was also to have it ascertained that the legal had expired, without the adjudication being extinguished by payment or intromission. The subsumption of a declarator of the expiry of the legal accordingly sets forth, That the pursuer was neither satisfied of the sums contained in the adjudication within the years of the legal by payment thereof, nor by his possession of the lands and intromissions with the rents thereof, nor in any other way. The conclusion of the declarator is, That it should be found and declared that the pursuer was not satisfied, nor paid the foresaid sums by his possession of the said lands, or by his intromissions of the rents thereof, nor in any other way within the years of the legal ; that the legal reversion competent by law to the defender was now expired ; that the said lands, ever since the expiry of the legal, have become irredeemable, and that the same shall now and in all time coming, pertain and belong to the pursuer and his fore-saids, as their own proper lands and heritages heritably and irredeemably.

The question as to the adjudication being or not being extinguished, cannot be assumed one way or other, without the sentence of a competent court, proceeding on sufficient data for its determination. The question is,—Whether an heritable subject shall be held to pertain to one man or to another ; whether to the original owner upon the footing of his debt, with which it was burdened, having been cleared off by intromissions, or to his creditor upon the footing of its not having been so cleared off ? In order to instruct the fact, the pursuer of the declarator supports the subsumption of his libel, by a statement of his intromissions during his possession. It is only by doing so that he can pretend to carry off his debtor's property, for it is expressly laid down by positive statutory enactment, that his intromissions to the extent of the debt shall extinguish the adjudication, and clear the subject thereof in the same manner as if it had never been led.

The doctrine contended for by the pursuer is founded not only on principles of law, but on very obvious rules of reason and equity. An adjudger can never have any serious ground to complain, when he is called on to relinquish the adjudged subjects, for he is only called on to do so on receiving payment of all that is due to him. If he prefers the adjudged subject to payment of his debt, he is unquestionably aiming at an undue advantage over his debtor. He aims at nothing less than carrying off a man's property without showing any valuable consideration for it. This is the more unjust when it is considered that he would thus foreclose redemption by the debtor, while he himself retains by law all the rights and privileges of a creditor.

STEWART
v.
LINDSAY.
1811.

The question too must be held as fixed by the cases of *Campbell v. Scotland*, and *Landale v. Carmichael*, both decided in 1794, by *Young v. Thomson* in 1799, by *M'Lellan v. M'Cree* in 1806, and by *Ormiston v. Hill* in 1809. All these cases were decided upon the principle that an adjudger could never plead a title of property, but must admit the debtor's right of redemption, unless he could defend himself either by a prescriptive title of infestment, clothed with forty years' possession, or by an unexceptionable decree of declarator of expiry of the legal obtained *causa cognita*.

PLEADED FOR THE DEFENDER.—By the statute law of Scotland, an apprising, or an adjudication, immediately on the expiry of the legal, transferred the property *ipso jure* to the adjudger, without either a declarator of the expiry of the legal or possession for forty years. The Act 1661, cap. 62, expressly provides that the creditor's right, by virtue of the said comprisings, be no ways prejudged after the expiry of the same, and that the whole lands and others, both such as shall be possessed by the debtor, and the remanent of the lands and others contained in the said comprisings, shall pertain to the creditor irredeemably. No language can be more positive or precise with regard to the point now in question.

ARGUMENT FOR
DEFENDER.

Relief was gradually obtained against the operations of this strict rule of law, but it proceeded entirely on considerations of equity. There is no room, however, for the interposition of

STEWART
v.
LINDSAY.
1811.

equity in cases like the present, where no iniquity of any kind was committed against the debtor, but where the only sufferer was the creditor, who got nothing in payment of his debt, except a subject, the value of which at the time was far below the amount of the debt.

The Court felt the necessity of exercising its equitable powers as far as it was possible, in order to correct the severity of the strict rule of law. For this purpose they scrutinized general adjudications with the utmost rigour, in order to discover how far they were regular in point of form, or exposed to objections in substantial justice, as containing a *pluris petitio*. If it appeared that an adjudication was liable to no objection in point of form or substance, the Court were under the necessity of giving it effect, according to the established principle of law. If, again, the adjudication was objectionable in point of form or in substance, the Court held that the adjudication was in strict law void and null, but in equity it was sustained to the extent of the true and just interest of the creditor. This was the principle of decision in the case of irregular and defective adjudications, which were null in strict law. Where, however, the adjudication was in every respect regular and unexceptionable, there was no principle of law by which it could be reduced to a security after the expiry of the legal, at which period it became an irredeemable right of property. Where too the adjudication was led for debts, exceeding at the time the value of the subject adjudged, there could not exist even a principle of equity for restricting it to a security. It could never be challenged in equity, where it was clear that no iniquity or penal consequence had ever taken place.

The reasoning of the Judges in the case of *Campbell v. Scotland*, as appears from the report of what passed on the Bench, favours the principles for which the defender contends. That reasoning proceeds on the idea, that the adjudger, by getting a large estate for a comparatively small debt, obtains an undue and unconscientious advantage over the reverser. In deciding the case of *Campbell v. Scotland*, the Court evidently proceeded on the idea, that the adjudger had obtained an undue advantage over the reverser, and that therefore the expiry of the legal was a penal irritancy, against which

the equity of the Court ought to interpose and afford relief. That this was the ground in which the Court proceeded, is rendered more clear from the report of the case by Mr. Robert Bell, who has preserved the opinions of the Judges. The decision in the case of *Campbell v. Scotland*, therefore, is by no means an authority in point in the present case. There can be no room or occasion for the interposition of equity in the present case. No iniquity was ever committed, and no penal consequence ever took place. On the contrary, the creditor adjudger got a subject of far less value than his debt at the time of his adjudication, as well as at the expiry of the legal.

STEWART
v.
LINDSAY.
1811.

The Lords "Repelled the defences, and found, that the defender was bound to account with the pursuer for his intrusions with the subjects in question."

JUDGMENT.
Nov. 26, 1811.

LORD MEADOWBANK observed,—“ I consider the decision in the case of *Campbell* as a great innovation, and I am sorry to see it met with any countenance from the Judge who led the case of *CAIRNFIELD*, which appears to be the solid law of Scotland. I doubt the propriety of applying the necessity of a declarator of all penal irritancies to the case of adjudications. The indulgence of law was in favour of the debtor. Apprisings and adjudications were sales under reversion. The whole policy of the law of Scotland is against requiring declarators. Its object is to secure property. By the case of *CAMPBELL*, property may be held for ages, and taken back. See the case by First Division giving effect to *Campbell's* case, after a period of forty-nine years. *Campbell's* case ought to have been followed by a declaratory act of sederunt, to secure the public. It is but one decision, and I wish to hear if you are also disposed to follow it, as the other Division have done in the case of *ORMISTON*. This is by far the most important case that has been before us since I sat here. Equity required that a state of debt, at expiry of the ten years, should have been ascertained if due, otherwise words of Act are precise, as *vigilantibus non dormientibus jura subveniunt*. The pursuer here may refuse to ratify the changes and may even pull down the bridge of Dunkeld. I have, in general, been clear to follow a solemn decision. But in so doing we may shake the great rule of the law of Scotland, that property is to

OPINIONS.
MS. Notes.
Lord President
Boyle's Note-
Book.

STEWART
v.
LINDSAY.
1811.

be secured against latent challenges. I have vibrated between the two, but on the whole I am for recurring to the solid foundations of the law before the case of Campbell, and am led to this by the logical conclusion drawn by the late President from the case of Campbell."

LORD ROBERTSON observed,—“I have listened with deference to the last opinion, but, after all, I have come to a different conclusion. That able argument was applicable to the law before the case of CAMPBELL. But we must be bound by it and the subsequent cases. It was solidly decided on a hearing to settle the point in all time coming.”

LORD CRAIGIE observed,—“The case of CAMPBELL appears to me not only just but expedient, although no friend to innovations. Relief was properly given, in consequence of a change in the former state of the law. An adjudication had been reduced to a security, and the declarator of expiry of the legal was a requisite consequence.”

“LORD JUSTICE-CLERK BOYLE and LORD GLENLEE concurred.”

MS. Notes.
Lord President
Boyle's Note-
Book.

In his Note-Book, LORD JUSTICE-CLERK BOYLE has written,—“On considering whole case, it seems to me that the decision in the case of CAMPBELL v. SCOTLAND, which was very solemnly argued, is fatal to the defender's present plea. It seems quite unnecessary now to go back on the ancient state of the law, which even long before the case of Campbell v. Scotland had been greatly mitigated, as that case must now be held conclusive on the point—that a declarator of expiry of the legal is absolutely indispensable.

“From observations on the Bench, it does not seem that the case of Cairnfield was then considered as quite well decided, and at any rate it was stated as going on specialties; and no such distinction as that now contended for by the defender, seems to have been made by the Court in the case of Campbell, though certainly Mr. Bell's account of the opinion of the Justice-Clerk tends to show he held similar views to those in case of Cairnfield. The report of that case of Campbell states,—‘That George Gibb adjudged a tenement of houses for a debt nearly equal to their value.’ The general question, however, was determined.

“It seems to me of importance to adhere to this general rule,

that nothing but a decree of expiry of the legal can avail, unless where possession has continued for forty years after the *ten*. I incline, therefore, to this view of the case, and on this principle our brethren in the First Division have acted in 1809, which strongly confirms my opinion, as it makes two decisions at least."

STEWART
v.
LINDSAY.
1811.

1. In the case of LIVINGSTONE v. GOODLET, February 22, 1704, the pursuer sued for maills and duties on a comprising of the lands of Gairdoch. The defender appeared, and craved to be preferred, as having apprised those lands long before; and in respect that the legal was expired, he claimed to be proprietor of the lands, the pursuer not having apprised within year and day of his adjudication, and not having used an order of redemption within the legal. The pursuer PLEADED, That the lands apprised were ten times above the value of the sums apprised for, and that it was hard to carry away a great estate for a small sum, and by an odious expiration to ruin debtors, and to exclude all other lawful creditors. It was farther pleaded, that all that was intended was to prevent an exorbitant unjust advantage, and that the pursuer would therefore pay the defender his whole principal sum, annual-rents, penalties, and accumulations, with the interest thereof since the disbursing, and all expense he could crave, as no more was wished, but to get access as a posterior creditor, to the remanent part of the debtor's estate, after the prior creditor was satisfied, *cum omni causa*.

2. The defender PLEADED,—Though a comprising be led for never so small a sum, if within the legal it be not wholly paid, but some part of it be still resting, there is no remedy. It carries the property, if the defender be not within year and day, to come in *pari passu* with it; or if he has neglected to use an order of redemption within the legal, to stop its running. If the defender cannot subsume and prove that the pursuer is satisfied by intromission, or otherwise, within the legal, then, if there was never so small a part of it resting, that carries the property of the whole lands apprised, *ob pœnam negligentiae*, whatever the disproportion be betwixt the sum and lands. Upon this bottom of expired comprising, stands the security of most of the estates of Scotland, which, like a corner-stone, is *non tangendum non movendum*.

3. The Court found,—“That as to the advantage taken of carrying away the estate by an apprising for a small sum, it was not in their power to remedy. They had indeed in such odious cases modified exorbitant penalties, to hinder estates from being swallowed up by such apprisings; but if that will

not do the turn, they had no power to prorogate legals, and keep them open, else they might be the arbiters and disposers of all men's estates. They, therefore, preferred the defender, and sustained his comprising to carry the right of the lands, and refused the pursuer's offer to pay the defender, *cum omni causa*."—*Fountainhall*, vol. ii. p. 226.

4. In the case of GORDON of CAIRNFIELD, July 1783, referred to by Lord Meadowbank in the case of Stewart v. Lindsay—a party possessing in virtue of an adjudication was assoilzied from an action of reduction. The case is not reported, but its nature is clearly brought out by the Lord Ordinary's interlocutor. Lord Braxfield, Ordinary, found—"In respect that the defender's author had a right to the lands in question, in virtue of adjudications, the legal of which were expired, and against which no nullity or legal objection does lie, and that the debts then justly due to him did exceed the then value of the estate, and in respect that he afterwards sold these lands to the defender at a full and adequate price, and that the defender did, as absolute proprietor, possess these lands from the date of his purchase in 1752 to the commencement of the present action without any challenge: Finds, that *post tantum temporis*, there is no ground in law or equity for restoring the pursuer against the expiry of the legal of these adjudications, and thereby involving the parties in a count and reckoning for the rents of the lands for

the space of threescore years, and therefore, upon the whole, repels the reasons of reduction, assoilzies the defenders, and decerns."

5. In the case of ORMISTON v. HILL, February 7, 1809, the plea insisted in by the defender as a bar to the redemption, was the *mora* of the reverser. A creditor adjudged certain subjects from his debtor in 1757, but no charter and infestment were expedite on the adjudication. After the expiry of forty-nine years, the heir of the reverser raised an action against the heir of the adjudger, concluding to have the adjudication redeemed. The defender PLEADED, That as a period longer than the long prescription had been allowed to pass, it would be inequitable to continue the privilege of redemption after so unreasonable a delay. The Court held that it must now be considered as settled law, that in order to convert an adjudication into an irredeemable right, and to extinguish the right of the reverser, it was necessary that the adjudger should either obtain decree of declarator of expiry of the legal, or regularly invest himself with charter and sasine upon the adjudication, and possess thereon for forty years, and that in all other cases an adjudication is no more than an heritable security like an heritable bond.

6. In reference to this case, LORD PRESIDENT BLAIR has written,—“Action brought for redemption of adjudication, led by Thomas Waugh, writer in Jedburgh in 1757. Although Waugh entered into possession, it does not

appear that the debt was extinguished by intromission within the legal or since; so that the action goes upon the general idea, which has been sustained by the Court, that without a declarator of expiry of the legal, an adjudication continues to be a redeemable right, like an heritable security. The petitioner's argument supposes that this would continue for ever. This is a mistake. The adjudger has it in his power to foreclose the right of redemption, either by declarator of expiry, or by taking infestment, and the positive prescription will run, not from the date of adjudication, but of the expiry of the legal, when it becomes, *ex facie*, an irredeemable right."—*MS. Notes, President Blair's Note-Book*.

7. In reference to the case of *STEWART v. LINDSAY*, Professor Bell, in his Commentaries, observes,—“In a case which occurred in 1811, the late Lord Meadowbank took occasion to say, that, even at the hazard of encountering a principle which ought to be sacred, namely, that uniformity should be preserved in decisions, it well deserved consideration, whether the above rule did not shake one of still greater importance, undermining the security of the proprietors of land? He stated it as a fundamental rule of Scottish law, that property should stand secure against latent challenges; and that, on the whole, it were wiser and better to adhere to this great doctrine, with all its consequences, than to follow a determination which he considered as proceeding on unsound reasoning;

that the right of the creditor is not in the nature of a penal foreclosure of the debtor, but a right of property under a power of redemption within a certain period. To this opinion Lord Newton assented. But, on the other hand, Lord Robertson, Lord Glenlee, Lord Justice-Clerk Boyle, and Lord Craigie, held that the rule had been well settled, and ought to be adhered to, both as a precedent and on principle; and that after the confirmation it had received in the case of *ORMISTON*, decided under Lord President Blair, it was not to be questioned.”—*Bell*, 1. 705. Professor Bell is mistaken in stating that LORD NEWTON concurred in the opinion of Lord Meadowbank, as he died in the month prior to the judgment, and Lord Justice-Clerk Boyle mentions the names of five Judges only as being present.

8. The report of the case of *CAMPBELL v. SCOTLAND*, given by Mr. Robert Bell, on which the defender founded, in the case of *STEWART v. LINDSAY*, and to which, in the same case, Lord Justice-Clerk Boyle referred, is not the report of the case as decided in 1794. It is the report of the case at a previous stage, in 1792, when the Court remitted the whole cause to the Lord Ordinary. On its again coming before the Court, a Hearing in presence was ordered, which lasted for several days. Mr. Solicitor-General Blair replied for the pursuer, and was followed by Henry Erskine, Dean of Faculty, for the defender.

A Decree of Expiry of the Legal, when obtained in absence, is liable to be opened up on certain grounds.

LANDALE v. CARMICHAEL.

Nov. 25, 1794. **NARRATIVE.** IN 1765, John Gibson of Durie adjudged from Thomas Landale, the pursuer's uncle, the lands of Little Balcurvie, *alias* Burns, in the county of Fife. In virtue of his decree of adjudication, he immediately entered into possession of the lands adjudged. After his death, his son continued to possess the lands, and, in 1776, he obtained in absence a decree of declarator of expiry of the legal, and in virtue thereof the proprietors of Durie continued to possess the lands.

In 1791, the pursuer, in right of the reverser, brought a reduction and declarator, for the purpose of setting aside the decree of adjudication, and the decree of expiry of the legal. The action was directed against the defender Carmichael, as the representative of the adjudger, and against the defender Christie, who had purchased the adjudged lands. The reasons of reduction were, *First*, That there was a *pluris petitio* on two of the debts adjudged for; and *Second*, That the debts were extinguished by intromissions within the legal. One of the pleas maintained by the defenders was, that the action was barred by the decree obtained in the declarator of expiry of the legal.

ARGUMENT FOR PURSUER.

PLEADED FOR THE PURSUER.—The plea that a decree of expiry of the legal shuts the chequer, and precludes future challenge on the part of the reverser, is rendered of no importance, by the circumstance that both the decree of expiry of the legal as well as the decree of adjudication, were pronounced against the pursuer's predecessor in absence. By the established principles of law, such decrees are liable to be opened up at any future time, when the party, who may have been prevented formerly from appearing, is enabled to proceed with his challenge. "Decrees in absence of the defender," it is laid down by Mr. Erskine, "have not the force of *res judicata*

against him, for where the defender does not appear, he cannot be said to have referred his cause to the decision of the Court, in virtue of the contract implied *in litis contestation*, which is the true ground upon which a decisive sentence becomes final. The defender may therefore be restored against such a decree."

LANDALE
v.
CARMICHAEL.
1794.

Material justice, therefore, and the established rules of judicial procedure, require that this question be considered precisely in the same light as if the pursuer's predecessor had appeared for his interest in the process instituted for declaring the expiry of the legal, and had offered to redeem the lands by making payment of the sums for which they had been adjudged. When treating of those equitable powers with which the Court are invested as a Supreme Court, Lord Stair observes,—"The Lords, on the reduction of their own decret *ex nobile officio*, do pass over nullities and informalities, where they see nothing wanting in material justice; but if any defect be in material justice, they do most strictly judge all informalities and nullities for opening the decree, that anything escaping in material justice may be amended." In the present case, various instances of *pluris petitio* can be proved to have taken place in the decree of adjudication sought to be reduced, and material justice cannot be done to the pursuer without opening that decree, and also the decree of expiry of the legal.

PLEADED FOR THE DEFENDERS.—The defenders have no occasion to maintain that the mere expiry of the legal will, *ipso facto*, transfer the property of the lands to the adjudger. Their author obtained a decree in 1776, finding and declaring that his debtor's right of reversion was at an end, and that he was no longer entitled to redeem the lands.

ARGUMENT FOR
DEFENDERS.

The origin of the action of declarator seems to be the well-known rule of law, that conventional irritancies are not incurred, or conventional rights of redemption cut off, till a d  cree of declarator to that purpose is taken; and it was natural and equitable to extend that rule to those rights of redemption which are introduced by law. It was probably owing to this, that decrees of declarator of expiry of the legal came first to be known, for no mention is made in the Statute Book of such an action.

LANDALE
v.
CARMICHAEL.
1794.

It is true that the decree in question was pronounced in absence of the defender ; but when the nature of such a decree is considered, that circumstance will appear to be immaterial. A decree pronounced in a declarator of expiry of the legal, is to be considered rather as a step of diligence than as a decree of the Court. If, therefore, an adjudger has done everything in his power to bring his debtor into the field, the decree, whether it proceeded in absence, or *in foro contradictorio*, ought to bar the debtor from insisting that he shall be allowed to redeem the lands upon payment of the debt due to the adjudger.

FIRST INTER-
LOCUTOR OF
COURT.
March 7, 1794.

The Court ordered memorials upon the question,—“ How far the *pluris petitio* on one or two of the articles affects the whole adjudication so as to open the legal?”

OPINIONS.
MS. Notes.
Elphinstone's
Session Papers.

LORD JUSTICE-CLERK BRAXFIELD observed,—“ Then comes the question, what is to be the effect of a decree of declarator that passes in absence, which generally happens ? The creditor has no need to bring proof that the debt is not paid. That is a negative which requires no proof. But when such decree of declarator in absence is afterwards challenged, if there appears such nullities as render the adjudication void, the decret of declarator cannot have effect. Or, if it can be shown that the debt was paid within the legal by intromissions, in that case there is no existing debt, and the decret of declarator cannot have the effect of carrying off the land for what is already paid. The lapse of ten years, *summo jure*, gives the right of property to the adjudger, but it is a challengeable right that may be defeated on the grounds mentioned.”

LORD ESKGROVE observed,—“ As to what objections may have effect after a decree of declarator, there is more difficulty, and it must depend on circumstances. I would not require such objections as amount to an absolute nullity in the adjudication ; and, in some cases, it would be very difficult to admit objections after declarator. For instance, if the lands have for many years passed through different hands as property *bona fide*, it would require something exceedingly strong to open such rights. In other cases less will be required, especially if lands continue with the original adjudger or his heirs, and it can be shown that the debt was paid within the legal ; or in many other cases, I would

even after decree of declarator, where I see hardship and injustice, listen to legal objections in order to give relief. The Court must, according to circumstances, explain the import and effect of their own decreet of declarator, and interpret it according to law and justice, as appearing from the facts."

LANDALE
v.
CARMICHAEL.
1794.

LORD PRESIDENT CAMPBELL observed,—“ Then comes the effect of the decree of expiry of the legal. I think that in all cases, where such a decree of declarator is demanded, it ought to be accompanied with an account of debit and credit, to show what intromissions, and what due of debt. The creditor is not to be hung up for forty years in suspense whether he is to have the debt paid or to remain proprietor of the lands. Therefore, in law and justice, he is entitled to insist in a declarator, and to call upon the debtor either to pay the debt, or to see the lands adjudged in property for ever to the creditor. I wish it was possible on this question, as on the former, to lay down some fixed general rule as to the effect to be given to a decree of declarator, but it is impossible to do so, for the effect to be given to such a decree must depend on the facts and circumstances of the case.”

On the Session Papers in this case, LORD PRESIDENT CAMPBELL has written,—“ As to the effect of declarator of irritancy, this at least shows the animus of the creditor to foreclose the reversion, and gives an opportunity to the debtor to say whether he is willing to abandon his property, by allowing it to go in solution of the debt. There can be no doubt that the parties may adjust the matters in this way. All that the adjudger can do is to bring his party into Court, and if decree is allowed to be taken, although in absence, much is to be said why this should be effectual, especially if the party has been personally cited, or if it can be made clearly appear that he was in the knowledge of the proceeding. In such a case, he ought not easily to be repomed, although the common rule is, that a decree in absence may be opened up at any time within forty years. Such decree is not merely for the purpose of declaring the law like a declarator of *liege poustie*. It serves the same purpose with a declarator of irritancy in tacks and feu-rights, by asserting the right of the one party, and calling upon the other to say what defence he has to make. In any such process, an account ought to be ex-

MS. Notes.
Sir Ilay
Campbell's
Session Papers.

LANDALE
v.
CARMICHAEL.
1794.

hibited, and the defender ought to be admitted still to purge the irritancy, if he is able so to do.

“It is not, however, to be laid down as a general rule, that after such a decree is obtained in absence, the pursuer or his heirs or postponed creditors, shall not in any circumstance be reponed. In the case of feu-rights or tacks, if the landlord or superior, in consequence of the declarator, obtain possession and perhaps set the lands to another vassal, matters are no longer entire, the decree is in effect homologated, and it is thought that the defender would afterwards find it extremely difficult, if at all possible, to be reponed. But if we suppose matters entire, no change of possession, and perhaps a suspension or reduction of the decree in absence brought in a short time, it is probable that the defender, upon paying the expense, would be allowed to be reponed against this decree in absence, and would still be admitted to purge.

“In the case of declarator of expiry of the legal, a great deal must depend on circumstances, such as the comparative value of the lands and of the debt, the length of time which has elapsed, and the objections of informality, if there be any, to the adjudication. In the former case of no declarator of expiry of the legal, we can and ought to lay down a broad general rule that there should be no foreclosure. In the other case we have not only the legal irritancy, but a judicial document taken upon it in the form of a competent process, which is the only possible step that could be taken by the creditor to assert his right, and to give fair notice to the reverser that he meant so to do, which in general ought to operate as an effectual bar, at least to the extent of throwing the burden upon the reverser to show good cause to the Court why he should still be reponed upon making full satisfaction to the other party. This will not be done, of course, but *causa cognita*, and therefore any such case must necessarily depend upon its own circumstances.

“In the present case, it is much against the now pursuer, that his father allowed himself to be ejected from the possession, and that he was personally cited in the declarator. At the same time, the lands appear to have been of considerably more value than the debt, and the adjudger is not altogether without

exception, for although the three debts are separately accumulated, and one of them is said to be unexceptionable, yet if there was a *pluris petitio* as to the other two, or any one of them, it must be admitted that the decree was upon the whole taken for more than was due. This will not go to denude, but at the utmost only to restrict."

LANDALE
v.
CARMICHAEL.
1794.

On advising the memorials ordered on the question, How far the *pluris petitio*, on one or two of the articles, affects the whole adjudication so as to open the legal, the Lords found,—
"That it was not an articulate adjudication, and therefore sustained the objections, and find it unnecessary to determine the general point of law."

JUDGMENT.
Nov. 25, 1794.

LORD JUSTICE-CLERK BRAXFIELD observed,—“I am clear that there is such a thing as an articulate adjudication, and that errors in each affect that only. The law of *pluris petitio* is founded on the notion that an adjudication is a *jus individuum*. If given for £100, it is not for £90. The separation of decernitures makes separate *jura*. But I doubt if this is properly articulate. The conclusion is alternative for joint or separate decree. Now the Counsel at the Bar did not make his option as he might have done. Nor had the extractor at desire of party any right to make it afterwards. In CAMELFORD'S case, the adjudication is for the sums *respective*, and the annualrents of these sums. So I hesitate, and wish to know the form and practice.”

OPINIONS.
MS. Notes.
Baron Hume's
Session Papers.

LORD ESKGROVE observed,—“Case not favourable. Declarators go without evidence. But this adjudication is not articulate by the act of the Judge. The libel has no separate accumulations, and in the end it is still only an alternative conclusion for joint or separate accumulations. Party should have made his option before Judge, as Justice-Clerk says. If it were a proper articulate adjudication, I should hold the articles as distinct as if on separate libels.”

LORD PRESIDENT CAMPBELL observed,—“I am for opening the legal. *First*, on point of form, because it is not a proper articulate adjudication. If it were so, we should have no other adjudication in Court. It would be dividing every debt in any degree doubtful into parts. If creditors are different, or grounds of debt are

LANDALE
v.
CARMICHAEL.
1794.

so, that will do. But not as here, a division of the same debt with a conclusion such as in this summons. *Secondly*, supposing it articulate, still as two-thirds of it are bad, I should hesitate to sustain it to carry the property ; for the question of sustaining it as a security is different and favourable to the creditor. I will always break in upon it, if I can, to that effect. It must be *totus teres atque rotundus*."

MS. Notes.
Sir Ilay Campbell's Session Papers.

On the Session Papers, LORD PRESIDENT CAMPBELL has written, —" The pursuer does not plead quite consistently, when he says, that the estate has become his absolute property, by an expired legal upon one of his three debts, and that it is a good subsisting security for his other two debts, notwithstanding the *pluris petitio*. An adjudger who pleads an expired legal, without positive prescription, ought to be in a condition to show that the decree of adjudication upon which he pleads is unexceptionable, that it is *totus teres atque rotundus*, without flaw or objection of any kind. But this he does not show in the present case, where it is two-thirds bad, and only one-third good.

" It has been rightly decided by the Court, that a general adjudication in its present form is to be held as a *pignus prætorium*, or right in security, till a decree of expiry is obtained. But a decree of expiry in absence does not mend the matter, if there be any flaw in the adjudication."

In the case of *YOUNG v. THOMSON*, Feb. 5, 1799, a party to whom the reverser had conveyed his right, and who had been infeft on that conveyance, was reponed against a subsequent decree of declarator of expiry of the legal, in respect that he was not a party to the action of declarator. The adjudging creditor raised his declarator of expiry of the legal against the reverser, and obtained decree in absence against him. Several

years afterwards, the reverser and the party to whom he had conveyed his right brought a reduction of the decree, on the ground that the latter had not been made a party to the action, although infeft in the subjects before the date of the action. LORD GLENLEE, Ordinary—" Found that the decree of declarator of expiry of the legal cannot affect the pursuer, George Young; and that, notwithstanding thereof, he is entitled to redeem

the subjects from the defender." The Court adhered.

2. In the case *MACLELLAN v. MACREE*, Jan. 21, 1806, the pursuer was reponed against a decree of expiry of the legal, which was obtained in absence. He **PLEADED**—There is no reason for holding that a process of expiry of the legal is to be governed by different rules from other actions of a similar nature. A decree in absence, pronounced in such a process, cannot have any greater effect than a decree in absence in other cases. Against all such decrees, a defender is entitled to be reponed. The pursuer is ready to show that the debt is nearly extinguished, and that it was entirely owing to the accident of the agent whom he employed, being engaged for the opposite party, that decree in the declarator was pronounced. The defender **PLEADED**—A pursuer has no mode in which he can oblige a defender to appear. But if a decree in absence might be opened up at any time within the period of prescription, it would be the interest of every debtor, who had not the means of immediate payment, to allow such decree to go out against him. He would thus have the alternative of paying the debt, or relinquishing the property, while the adjudger had no alternative, being obliged to hold the estate as full payment. This doctrine would, in effect, protract the legal for forty years from the date of the declarator, besides deductions on account of minority, which might extend it still farther, and would place adjudging creditors in a state of

great uncertainty. **LORD JUSTICE-CLERK HOPE**, Ordinary, assailed the defender, but the Court by a majority altered that interlocutor, and found the pursuer entitled to be reponed against the decree. The minority expressed their opinion against opening up the decree, because it was not alleged that the adjudging creditor had, in any particular, transgressed the law, or omitted the regular steps necessary for attaching the property in payment of his debt.

3. Professor Bell, in his Commentaries, observes,—“The adjudger’s right is converted from a redeemable security into an absolute and irredeemable right of property, by a decree of **DECLARATOR OF EXPIRY OF THE LEGAL**. The **LEGAL** is an elliptical expression for the legal term of redemption; and the declarator of **EXPIRY** is an action before the Court of Session, in which the adjudging creditor calls on the debtor to exercise his right of redemption, otherwise to have it judicially declared to be foreclosed. The debtor may, in this action, require the creditor to account for his intromissions with the rents, so as to have the balance ascertained, on payment of which the lands may be redeemed.

4. “Where the decree of declarator has been pronounced in absence, it has been thought doubtful whether it can be opened up again like a decree for an ordinary debt. At first sight, the cases are a little perplexing. But the following distinctions seem to explain and reconcile them:—1. An irregularity in the original diligence of

adjudication will entitle the debtor to open up the decree of declarator, which is considered only as an accessory, partaking of the nature of its principal: 2. Irregularity in the proceedings, or decree of declarator, will entitle the debtor to relief; or, 3. If the debt was paid off or extinguished within the legal, the debtor will be relieved against the decree of declarator.

5. "In examining the cases it will be found, 1. That in *LANDALE v. CARMICHAEL*, 25th November 1794, there was a *pluris petitio* in the adjudication. 2. That in the case of *BRACKEN-*

RIDGE in 1809, the proceedings in the declarator were objectionable, as against a minor, without calling his tutors. 3. That in *M'LELLAN v. MACREE*, 21st January 1806, the judgment may, in some degree, be ascribed to the declared purpose of the defender to oppose the declarator, which was defeated by a mistake known to the pursuer or his agent. And, 4. That in *AITKEN v. AITKEN*, January 1809, the debtor was abroad, and, at least during part of the term which had elapsed after the decree of adjudication, a minor."—*Bell*, 1, 705.

Extrinsic Objections to an Adjudication are lost by the Negative Prescription.

PAUL v. REID.

Feb. 8, 1814.

NARRATIVE.

IN September 1719, John Wallace granted to John Reid, the father of the defender, an heritable bond over certain subjects belonging to him, and on this bond Reid was immediately infeft. In 1721, Reid obtained a decree of adjudication of the lands over which his bond had been granted. This decree of adjudication passed in absence, and no infeftment was taken upon it. In 1733, he obtained a decree of declarator of expiry of the legal. This decree was obtained in absence also against the representatives of Wallace, the granter of the bond. After this decree, Reid and his successors continued to possess the property down to the year 1810, without challenge from the original debtor. In 1803, the defender's predecessor obtained a charter of adjudication and confirmation from the Crown, on which he was infeft.

In 1810, the pursuer by service to Wallace, the original

debtor, acquired right to an unexecuted procuratory of resignation, in one of the ancient titles to the subjects adjudged, by means of which he obtained a Crown charter, and was duly infeft. Upon this title, as heritable proprietor of the subjects adjudged, he raised an action of reduction of the decree of adjudication obtained in 1721, and of the decree of declarator of expiry of the legal obtained in 1733. The defender pleaded, That the pursuer was debarred by the negative prescription from challenging the decree of declarator of expiry of the legal.

PAUL
v.
REID.
1814.

PLEADED FOR THE PURSUER.—It is an established point in the law and practice of Scotland, that the negative prescription applies only against debts and obligations, and that it can have no effect against real rights of property, unless the party pleading it can at the same time instruct that he himself has acquired a real right to the subject by the positive prescription. If he is not vested with such real right of property, and has but an obligation or incumbrance in his person, he cannot set up these as sufficient to exclude the right of the true owner. They cannot avail him to this effect, although he may have possessed upon them for twice the period of forty years. The law on this subject is, that obligations or incumbrances are not titles of such a nature as to found a prescriptive plea against a real right of property.

ARGUMENT FOR
PURSUER.

It is clear from the statutes 1469, cap. 28, and 1474, cap. 54, that the negative prescription refers exclusively to cases where there has existed a *jus debiti et crediti*, or, in the language of the earliest of these statutes, an *obligation* that may be followed, or which may be made the ground of demand against some person standing in the situation of debtor or obligant. The negative prescription is not a mode of acquiring property, but merely of extinguishing the obligation or burden to which the debtor may have been subjected either by his own act or deed, or as the representative of the person by whom the obligation or burden was contracted.

The case of *PATON v. DRYSDALE* clearly establishes that nothing short of a title by infeftment, cloathed with forty years' possession, can found an adjudger in the plea of the negative prescription against the right of the original proprietor. In

PAUL
v.
REID.
1814.

that case it was found,—“ That the adjudger, though forty years in possession, yet, *not being infest*, he could not object the negative prescription against the pursuer as heir.” It is true, that the words of the interlocutor may be used to show, that if the adjudger was infest at all, however recently, he might competently plead the negative prescription. The report of the case, however, shows that the expression “not being infest,” does not mean that the adjudger was not infest at all, but that he was not infest for the forty years during which he had been in possession. The report expressly bears that the adjudger was infest in 1719—six years prior to the date of the judgment. The expression in the interlocutor, therefore, “not being infest,” can mean nothing else than that the Court required an infestment along with possession of forty years’ standing. In other words, the adjudger must have acquired a right to the property by the positive prescription, to entitle him to plead the negative prescription against the heir of the reverser.

If an opposite doctrine were held, it would lead to very anomalous consequences. For example, the rightful proprietor of a subject would be excluded from it, by the negative prescription pleaded against him by a party who might not obtain a title of property for thirty-nine years yet to run. The real owner would thus be excluded by the negative prescription, while there was no one who had acquired a right to the subjects by the positive prescription. There would thus be an heritable property without an owner, and the only person possessing, or entitled to possess, would be a mere incumbrancer, although an incumbrancer can possess only in right of the heritable proprietor.

It is argued, that the right against which the negative prescription is pleaded, is not a right of property, but merely the right of suing a reduction,—that in this reduction the defender is the exceptor, and that although the right of pleading an exception is perpetual, the right of prosecuting an action must fall if not followed forth in forty years. This, however, is a most erroneous view of the case. The present action rests upon a right of property, which is altogether independent of the right of suing an action which is represented as the sole ground on which the pursuer is entitled to proceed. It is not as reverser under the adjudica-

tion that the pursuer insists in the present action, but as being heritable proprietor of the lands. This is the express character in which he pursues, and it is a character he is entitled to assume as heir served to the former proprietors of the subjects. The object of the action is not to rear up any demand or claim against the defender, but merely to have it declared that the debt originally due by the pursuer's ancestors to the ancestor of the defender, is paid off and extinguished. "Exceptions which relate not to the constitution, but to the extinction of a claim, not being intended to have any further operation, are seldom productive of an action, and so cannot be founded on till the persons having right to them be sued upon the claim. An exception, therefore, arising from the discharge or acquittance of a debt, or from receipts of money restricting the debt to a fixed sum, must be perpetual. Nay, if the debtor should, for his farther security, bring an action after the years of prescription for declaring the debt to be paid off or restricted by those vouchers, it cannot be objected to him, that his right of action is prescribed, since the intention of it is not to rear up any demand or claim against the defender, but barely to extinguish an obligation which was once due by himself."—*Erskine*, 3, 7, 11.

The present action is of the nature of a declarator of exoneration from certain burdens and incumbrances which at one time affected the subjects in question. If so, it is clear from the doctrine laid down by Mr. Erskine, that the present action cannot be affected by the negative prescription.

PLEADED FOR THE DEFENDER.—The point at issue is, Whether the adjudication and decree of expiry of the legal obtained by the ancestor of the defender in 1733, can now be set aside at the instance of the pursuer? The defence to the action is, that prescription has run from the date of the decree of declarator of expiry of the legal in 1733, and that the right of bringing an action of reduction of that decree has thus been extinguished. In answer to the plea of prescription, the pursuer pleads, that the negative prescription applies only to debts and obligations, and not to real rights of property. This proposition, however, has no application to the present case. The defender has never

PAUL
v.
REID.
1814.

ARGUMENT FOR
DEFENDER.

PAUL
v.
REID.
1814.

pleaded, that the negative prescription applies to a right of property.

The plea of prescription urged by the defender is, that the right of the pursuer *to bring an action of reduction* of the decree of declarator of expiry in 1733, is extinguished by the negative prescription. This plea does not depend in the least upon the application of the negative prescription to a right of property.

The right of heritable property which was once in Wallace, whom the pursuer represents, is not pleaded to be extinguished by prescription of any kind. The right formerly in Wallace was validly transferred to the defender by the adjudication, decree of expiry of the legal, charter of adjudication, and infestment thereon, which titles were obtained by the ancestor of the defender, and by the defender himself. Those proceedings are in themselves perfectly sufficient to vest the feudal property of the lands in question in the defender.

The pursuer, however, pleads that he has a right of action to reduce the decree of expiry of the legal, and in that way to cut down the title of the defender. It is against this plea of the pursuer, that the negative prescription is opposed. It is a wilful confusing of the case, to affect to view the question as still relating to a right of property. If the pursuer will admit that he has not a right of reduction of the decree of expiry of the legal, how then will his case stand? He says, that he founds on a right of property. Let him then keep this right of property, but leave the decree of expiry of the legal unquestioned, and the defender will be content. It is manifest that the issue or question of law on the point of prescription in this case is, Whether does a right to reduce a decree of expiry of the legal fall under the negative prescription, or is it perpetual unless excluded by the positive prescription?

The Statutes 1469 and 1474 do not apply to heritable rights at all. They extend to all moveable rights and actions. The Statute 1617 was intended to complete the rule of prescription by extending it to heritable rights and actions. It was impossible, however, to extend the negative prescription to all heritable rights. For to extinguish heritable right in one party, would in many cases have been unavailing, since that would not

have served to have established it in another party. Heritage in this respect is in a different situation from moveables. It can only be held by feudal titles from a superior. If, therefore, a person possessing land, had not a valid feudal title to it himself, he could have derived no advantage from a rule of negative prescription, extinguishing the claims of other parties. He would still have had no right to the land as against the superior. In applying prescription to heritage, therefore, the first object was to constitute a prescription that should establish title by possession. The first part of the Statute 1617, accordingly, provides that forty years' possession, on an *ex facie* title, shall be held in all respects equivalent to a perfectly good, formal, and unexceptionable title. This is what is called the positive prescription, and is a rule indispensably necessary in our feudal law of heritable property, where the negative prescription could not possibly have secured the party possessing the lands, because it could not have given him a title.

PAUL
v.
RUID.
1814.

The Statute 1617 did not however stop here. It farther expressly extended the negative prescription to rights and actions regarding heritage, in cases where that prescription could be availing. The words of the Statute are incapable of receiving an interpretation limited to personal rights; for the rights constituted by, and actions competent upon, heritable bonds and reversions are not personal but real, and the subsequent words, "and others whatsoever," are of the most extensive nature, and clearly apply to all actions whatever regarding heritage. The only rights which it appears the Statute did not mean to subject to the negative prescription, were feudal rights of property by infeftment. There was an obvious reason for this, for it could have answered no purpose to have allowed the operation of the negative prescription against those rights in any case which was already provided by the positive. For the party pleading the negative prescription against them, must either have had a title in itself valid, in which case there was no need of prescription at all. Or, he must have had a title by the positive prescription, in which case there was no need of the negative. Or, he must have had no title at all, in which case it could not have availed him to plead the negative prescription, since he still could not have held the lands for want of a title in himself.

PAUL
v.
REID.
1814.

There was therefore no room for the application of the negative prescription to infeftments of property in heritage, and accordingly it does not appear that the words of the Statute were intended to apply that prescription to them. But to all other heritable rights, and particularly to all heritable actions, it is clear that the negative prescription was extended by it.

The idea that a reduction of a decree of expiry, such as the present, is nothing more than a declarator of exoneration, is a plain fallacy. A pursuer of exoneration is in the situation of a defender against a claim of debt. But there can be no exoneration where there is no claim of debt. The defender does not make any claim, neither does he defend against exoneration from any claim. He defends against reduction of a decree of expiry, in consequence of which he had both property and possession. There is more reason for excluding the negative prescription in this case than in any other. The pursuer's argument must be, that when the legal of an adjudication has expired, and a regular decree of expiry has been taken upon personal citation upon the defender, and when forty years, or twice that period, has elapsed without any challenge of that decree, it is still competent to the heir of the former proprietor to open up all these proceedings, and to redeem the lands. If there be any ground of reduction peculiarly liable to the negative prescription, it is surely such a ground as that insisted in by the pursuer. The statute law says, that the expiry of the legal alone shall give the adjudger an indefeasible right. The Court, from equity, have allowed the reverser the benefit of a declarator of expiry of the legal. But it is impossible to hold that the reverser, by absenting himself in this process, is not only to have the benefit of opening up the decree like common decrees in absence, in spite of all the creditor can do to render it conclusive, but he is farther to enjoy an immunity from the common rule of negative prescription. That rule is peculiarly applicable to a right of reduction, and the necessary effect of it is to give to decrees in absence final validity. The negative prescription is therefore submitted to be clearly applicable to the present case.

LORD GILLIES, Ordinary, found,—“ That the pursuers are de-

barred by the negative prescription from challenging the decree of declarator of expiry of the legal, which was obtained so long ago as 12th December 1733 ; and, therefore, sustains the defences ; assoilzies the defender from the whole conclusions of the action, and decerns.”

PAUL
v.
REID.
—
1814.
Interlocutor of
Lord Ordinary,
June 12, 1812.

The Court unanimously adhered.

LORD SUCCOTH observed,—“ The brocard about negative prescription, if understood without limitation, would destroy that prescription utterly. It truly applies to him only who has no *manner* of title of property in his person on which to hold the subject. I agree on that head with what Kilkerran says in his report of *CLERK v. EARL HOME*. Now that objection don't apply here, where Reid has an infestment or decree of expiry and adjudication. The title is quite good if this reduction were out of the question. I hold that the negative prescription does apply to such a right of action, though relative to an heritable right. It would be a dangerous position to lay down, that it does not touch questions relative to and affecting heritage. If so, a reduction on deathbed would not be affected by it. The words of the Act 1617 apply to this case directly. True, the decree was in absence, but if not quarrelled for forty years, it is as good as *in foro*. Formerly there was no need of such decree at all ; and to require it, was a great alteration in the debtor's favour. But it would be a great stretch to open it up after forty years, unless in a case of intrinsic nullity. If a voluntary conveyance is good in forty years, why not a judicial one ? But it is said, there are intrinsic nullities here, and that the decree does not show that the debt was *not* paid within the legal. But that does not appear from the decree, and the use of negative prescription is just to exclude such pleas. In the case of Paton, there was an intrinsic nullity.”

JUDGMENT.
Feb. 8, 1814.
OPINIONS.
MS. Notes.
Baron Hume's
Session Papers.

LORD HERMAND observed,—“ It is objected that negative prescription don't apply to a right of property. That won't do *here*, for the defender's plea rests on the pursuer's property. It is truly a competition between a disponent and a disponent in possession, who having sat for forty years, has excluded all objections to the disposition that are not intrinsic. That plea is as good in case of a judicial as of a voluntary conveyance.

PAUL
v.
REID.
1814.

The case of CAMPBELL v. SCOTLAND was the first that required a decree of expiry. That the decree was in absence is of no moment. The *brocard* as to negative prescription is truly extravagant. I never understood it. It would exclude the negative prescription altogether, at least it would limit it to those cases where there is also positive prescription, and then it is of no use. In short, it applies to these cases only where the possessor has no title, as in the case noted by Kilkerran. It merely means that a party pleading it must have an interest."

LORD BALGRAY observed,—“A short and clear case. We have of late lost sight of the true nature of adjudication, which is an heritable right of property *sui generis*, and is as well entitled to protection as any other property. Who ever heard of a second constitution of the debt before taking decree of expiry? No such thing is requisite. It lies with the debtor to come forward and state his objections, if there be any; and if he does not, and lets forty years pass, his mouth is shut for ever.”

LORD PRESIDENT HOPE observed,—“I am of the same opinion. I never understood the *brocard* about negative prescription. What Bankton states is incorrect. Erskine is not correct either. Though, I think, he refers to cases where the possessor has a title, but a bad one, which requires positive prescription to mend it. The objection to the pursuer is, that he is so situated that he must come forward in the shape of an action, and *that* the negative prescription excludes; and that being excluded, the defender is safe on the title he has, which in itself is unexceptionable, as coming from the true owner, the pursuer's predecessor.”

1. The case of PAUL v. REID, and also the cases classed under the two following Propositions, belong more properly to the Title of Prescription, which falls to be considered in a subsequent portion of the work. It has been thought proper, however, to exhaust the

subject of ADJUDICATION FOR DEBT.

2. In the case of GEDD v. BAKER, Dec. 5, 1740, which will be given at length under a subsequent Proposition, the Court found that forty years' possession, upon an infestment proceeding upon a

charter of adjudication, excluded all objections of nullities against the adjudication or grounds thereof, although there had not been forty years' possession since the expiry of the legal. If there had been possession for forty years after the expiry of the legal, the adjudger's right would have been secured by the positive prescription. Although, however, he was prevented pleading the positive prescription, he was found entitled to plead the negative against an action seeking to reduce his adjudication, on the ground of nullities extrinsic of the adjudication. LORD KILKERRAN appends the following note:—"N.B. There is no doubt but it is competent to allege payment within the legal, any time within forty years after expiry of the legal." The date at which the right to prove payment within the legal began to prescribe, was necessarily the expiry of the legal. The date, again, at which the right to reduce the adjudication on extrinsic nullities began to prescribe, was the date of the decree of adjudication. The pursuer of the reduction, therefore, although barred by the negative prescription from reducing the decree of adjudication, by the lapse of forty years from its date, was not barred from pleading payment of the debt during the legal, until the lapse of forty years from the date of the expiry of the legal. According to the law, however, as it now stands, the right of the reverser to plead extinction of the debt, either by payment or by intromissions, remains perpetual, un-

less a decree of the expiry of the legal is obtained. Until such a decree is obtained, the debtor is entitled to reclaim his lands, on paying such balance as may be found due on an accounting taking place between him and the adjudger.

3. The doctrine laid down by Mr. Erskine, and to which frequent reference was made in the case of *PAUL v. REID*, is in these terms,—“The negative prescription of heritable rights of property cannot be pleaded even by one who hath a title in himself proper to be the foundation of a positive prescription, if it be not actually established in him by that prescription; because the negative prescription confers no right on him who pleads it, but barely extinguishes that which is in the adversary, and consequently none but he, who hath in himself a full right of property in the lands, can have any interest to plead against his party, that he has lost his by the negative prescription, since by that plea his adversary's right cannot be transferred to himself.”—*Erskine*, 3, 7, 8.

4. The doctrine contained in this passage of Mr. Erskine is substantially correct, although it might have been more accurately expressed. The fundamental rule in the law of prescription as regards a right of property in land is, that a right of property in land is not subject to the negative prescription. A right of property in land cannot be lost *non utendo*. This fundamental rule is a necessary consequence of the feudal

principle, which regulates the transmission of land, that there cannot be any right of property in land without an infestment. The universal rule is, *NULLA SASINA NULLA TERRA*. This rule necessarily requires the production of titles in a competition for land. In the competition, the competing parties must trace their respective progresses to a common author, and ultimately to the Crown, from whom all titles to land originally proceed. In the competition of progresses, the prior infestment flowing from the common author must prevail, unless the subsequent infestment is fortified by the positive prescription, or unless it can be shown to have flowed from the party in right of the prior infestment. If the party in right of the subsequent infestment cannot prove possession on his title for forty years, or cannot show that his subsequent infestment is connected with the prior infestment, the prior infestment must prevail, although more than a century may have elapsed since the loss of possession by the party in right of the prior infestment.

5. In the case of *PAUL v. REID*, the pursuer founded on the plea, that a right of property could not be lost by the negative prescription, but the application of that principle was in his case erroneous. The defender was unable to plead the positive prescription, from his not having possessed for forty years on his charter of adjudication, but the decree of adjudication on which the charter proceeded was virtually a title flowing from the

pursuer's predecessor. A title to land constituted by adjudication, is a judicial title; and although not a voluntary one, is still a title flowing from the debtor. By means of it, the creditor adjudging is connected with his debtor's infestment. Like any other title flowing from a proprietor, it is liable to be reduced on certain grounds; but if the title is *ex facie* good, and the grounds of reduction are consequently extrinsic of the title, the right to reduce on such extrinsic grounds is lost by the negative prescription. The right again to reduce on intrinsic grounds is perpetual.

6. The inaccuracy in the form of expression employed by Mr. Erskine consists in his appearing to admit that the negative prescription can *EVER* be pleaded against a right of property. He states, that the negative prescription can only be pleaded by one who has established a title by the positive prescription. It would be more correct to say, that the negative prescription can *NEVER* be pleaded against a right of property. It is by the positive prescription alone that the *verus dominus* can be deprived of his right of property. Nor can there be any necessity for pleading the negative prescription when a party has a title by the positive prescription. The inaccuracy of expression now referred to is trifling in itself, but it has acquired great importance from the use which has been made of it in argument, in various cases, involving the application of the law of prescription. This, however,

will be more fully considered under the Title of Prescription.

7. The language of Lord Bankton does not appear liable to a similar objection. He observes,—“By the negative prescription, only obligations, real or personal, can be cut off, but no right of property can thereby accrue, for that can only be acquired by transmission from the proprietors, or the positive prescription. Thus, though the proprietor has neglected to insist for recovery or possession of his property for forty years, yet he cannot be thereby excluded from suing for it, unless the possessor has gained the property by the positive prescription; for only a right from the true proprietor, or from another, made sure by the positive prescription, can establish a right of property. After the positive prescription is accomplished, the author is presumed, *præsumptione juris et de jure*, to have been the true proprietor, but not till then; so that, without the positive prescription, the competition must go according to the priority of the rights, by progress from the Crown.”—*Bankton*, 2, 12, 45.

8. In his valuable work on Prescription, Mr. Napier observes,—

“Perhaps Mr. Erskine merely meant to express, that no proprietor can be excluded from his direct declarator of heritable property by *negative* prescription; and when excluded in such a case by prescription at all, it is that his antagonist produces an exclusive title, fortified in terms of the Act 1617, *i.e.*, pleads *positive* prescription. But the loose manner of wording the passage in question has occasioned two erroneous conceptions, which will be found to have greatly perplexed some of our leading cases of prescription. It has been sometimes taken to mean, that negative prescription, even of those heritable actions that are susceptible of that rule, cannot be pleaded, unless positive prescription is either running, or actually completed at the same time; while, on the other hand, the equally unsound view has been deduced from the same passage, namely, that the negative prescription is so connected with the positive, that a claim *qua verus dominus* does fall under the negative prescription if the defender can, at the same time, plead the positive.”—*Napier's Commentaries on the Law of Prescription*, p. 80.

Intrinsic Objections to an Adjudication may be pleaded at any time, notwithstanding the lapse of Prescription.

I.—PATON v. DRYSDALE.

July 20, 1725. IN 1679, Robert Blackburn adjudged the lands of Hillfoot from the pursuer's predecessor. In virtue of that adjudication, to which the defender had now right, the lands had been possessed by him and his authors for upwards of forty years. The pursuer, as heir to his predecessor in the lands of Hillfoot, brought a reduction of the adjudication. The grounds of reduction were certain nullities objected to the adjudication, particularly that it was pronounced and extracted on the same day. The defender pleaded the negative prescription.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—Nothing can hinder the pursuer, as heir to his predecessor, from claiming the property of the lands, unless his predecessor had been denuded of it, or unless the defender had acquired a right to it by the positive prescription. Neither of these grounds exist in the present case. It is true that an expired adjudication is a good title to denude a debtor; but then all objections to which it is liable are proponable at any time, by way of exception or reply, when it is set up as a title to exclude the proprietor, unless it is secured by the positive prescription. For exceptions and objections of nullities are perpetual, and the longest course of possession cannot make the title, namely, the adjudication, which is only a personal right, better than it originally was. By the Statute 1617, the positive prescription requires an infestment, as the title and forty years' continued possession thereupon.

The defender's infestment in his adjudication was no earlier than 1719. He cannot, therefore, found upon the positive prescription. As to the negative prescription, that cannot defeat the pursuer's right of property. It is only competent to debtors in obligations whereon no documents have been taken by the creditors for the course of forty years; for the obligations thereby become extinguished, the prescription being a legal discharge.

But rights of property cannot be cut off in that manner, for they cannot be lost to one unless they are acquired by another.

PATON
v.
DRYSDALE.
1725.

In the civil law, *usucapio*, which is the same with the positive prescription in our law, required a just title as well as continued possession, and without a proper title the longest possession could not avail. By later constitutions, the prescription of obligations was introduced, which only afforded a defence to the debtor against any obligation not sued upon within the time limited.

After this example, the prescription of heritable rights was introduced into our law by the Act 1617. Before that Act no such prescription took place, though the negative prescription of obligations was long before in use, by the old Statute James III.

The clause in the Act 1617, concerning the negative prescription, is of the same kind, but extending it to heritable obligations. This clause, however, touching the negative prescription, does not concern rights of property more than the old Statute did. The chief intendment of the Act 1617, as appears from the preamble, was to regulate the prescription commonly called the positive prescription. To establish this prescription, it requires infetment, and forty years' uninterrupted possession.

PLEADED FOR THE DEFENDER.—The defender and his authors having obtained possession upon the adjudication, and continued in possession for upwards of forty years, his title was secured by the positive prescription. Farther, no action having been brought within that time against the defender or his authors, the pursuer cannot now be allowed to object the nullities on which he founds, because he is excluded by the negative prescription.

ARGUMENT FOR
DEFENDER.

Though the Act 1617 mentions an infetment as the title of a positive prescription, yet it does not exclude other titles of possession, such as an adjudication. An adjudication being a good title of possession, may found the adjudger in the positive prescription, if continued for forty years. This seems to be the opinion of Sir George Mackenzie in his observations upon that Act.

*Intrinsic Objections to
notwith*

July 20, 1725.

NARRATIVE.

IN 1679.
from the
to whic'
sessed
purs
br

ARGUMENT
PURSUER

not entitled by the Act
possession, yet the pursuer is ex-
from objecting any nullities
did not insist on them within forty
of possession being obtained upon
That all actions competent upon
contracts, or others whatsoever,
within the space of forty years. The general
WHATSOEVER, must comprehend all claims for
was competent, and consequently must com-
Upon this ground, the Lords
of property. Upon this ground, the Lords
of reduction, *ex capite lecti*, prescribed *non*
within forty years.
The Act 1617 mentions reversions expressly which do pre-
scribe, with an exception of those incorporated in *gremio juris*.
This exception, however, cannot relate to legal reversions.
When, therefore, the pursuer objects nullities to the adjudica-
tion, so as to open it, and render it still redeemable, he is by the
Act expressly debarred *non utendo* for upwards of forty years.
The adjudication must therefore remain an absolute and irre-
deemable right.

JUDGMENT.
July 20, 1725.

The Lords found,—“ That the adjudger, though forty years in
possession, yet not being infeft, he could not object the nega-
tive prescription against the pursuer as heir.”

II.—AINSLIE v. WATSON.

July 25, 1788.

NARRATIVE.

IN 1687, the defender's father adjudged the lands of Halkerse
from the pursuer's father, and in the same year he obtained a
charter from the superior and was infeft. In 1733, the pur-
suer brought a reduction of the defender's right, alleging several
informalities to the adjudication on which the charter proceeded.
The defender pleaded the positive prescription in respect of
forty years' uninterrupted possession on his charter and *sasine*.
Interruptions, however, having been proved, the Court found it

then that the defender and his father had peaceably possessed the lands of Halkerse for the space of forty years, continued together, so as to establish a right to the lands, and therefore repelled the defence founded on possession, leaving the consideration, How far the pursuer is now entitled to object to the defender's adjudication.

AINSLIE
v.
WATSON.
1738.

PLEADED FOR THE PURSUER.—Objections arising from intrinsic nullities never prescribe. A security null in itself cannot become valid and effectual by the mere lapse of time. Extrinsic objections, not arising *ex facie* of the deed, but competent to be proponed and proved against it, may be cut off by the negative prescription. This distinction betwixt intrinsic nullities, appearing *ex facie* of the deed or diligence itself, and extrinsic objections, or reasons of reduction competent against it, but requiring some distinct and separate proof or evidence, removes all difficulty upon the present question.

ARGUMENT FOR
PURSUER.

The adjudication in question now objected to labours under intrinsic nullities.—1st, It is not libelled in terms of the Act 1672, the first alternative thereof being altogether omitted. 2^d, Notwithstanding it is a total adjudication, it is led for £157 more, as a fifth part of the principal sums, which is erroneous both in fact and in law, for the fifth part was truly 200 merks, and the total adjudication could only be lawfully led for the conventional penalties, amounting to £70 Scots. 3^d, The adjudication is passed on 3d February 1687, and yet the sums are accumulate and made to carry interest *retro* from Martinmas 1685, *id est*, for no less than fifteen months. No lapse of time can render this a good and valid adjudication, any more than a bond or sasine, wanting the required formalities, could be rendered valid. If the objection to the adjudication depended upon an extrinsic proof, for example, of payments made, and not allowed in it, in order to instruct that it was led for more than was due, there might be reason to hold that ground of reduction as cut off by the negative prescription. In the case of *Paton v. Drysdale*, July 20, 1725, the Court found the negative prescription was not competent to be objected by an appriser, against the heir of the debtor, offering to reduce the same after forty years upon nullities.

AINSLIE
v.
WATSON.
1788.
ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The reduction now brought of the adjudication is excluded by the negative prescription. A reduction upon the formalities now founded upon was competent from the date of the adjudication, and forty years are run not only from its date, but also from the date of the infeftment following upon it. It has hitherto been held that all actions of reduction prescribe within forty years. Thus reductions, *ex capite inhibitionis*, and upon the head of interdiction and of fraud and circumvention. If a deed wants the substantial requisites it is no deed, and will not become a deed by any lapse of time. No action can go upon it, nor can an exception be founded on such a deed. But where the deed is complete, but is liable to exceptions, there the prescription will exclude the reduction, and the proponing of the exceptions.

JUDGMENT.
July 25, 1788.

Elchies' Decisions, vol. ii.
p. 7.

The Lords found,—“ That the objections to the adjudication were receivable, notwithstanding of the lapse of prescription.”

LORD ELCHIES in his Decisions states,—“ The Lords adhered to the Ordinary's interlocutor, and found that the forty years does not exclude the objections to the adjudications, which may be reconciled to the former decisions of the Court, as to the nullities appearing *ex facie* of the decret ; but I own I did not think it reconcilable with them as to the extrinsic proof.”

MS. Notes.
Kilkerran's
Session Papers.

On the Session Papers in the case, LORD KILKERRAN has written,—“ Elchies took notice of a decision in 1676, June 7th, the Laird of Pilvaro ; another in 1665, *Young v. Young*. The case of Tolly, also, is in point. Other cases were also mentioned in the papers. In all these cases a decret has been found unchallengeable by the negative prescription, and so that point became our law. It were dangerous to unsettle so established a point. The Lords seemed not to relish this doctrine, pretty much upon the same reasons as in the Information for Ainslie. At last Elchies, and others who joined him, made this observation, that were the nullities objected, no other than adjudging for more than was due and such like, which required extrinsic proof, they could not agree to recede from the former practice ; but as in this case there was a nullity *ex facie* of the decree, being a general adjudication of the lands, and yet for a fifth more, that might difference the case. And so the judgment went repelling the negative prescription.”

1. The judgment in the case of *PATON v. DRYSDALE* is inaccurately expressed in two particulars. It is inaccurate in the statement that the adjudger was not infest; but what is intended to be stated is obviously this—that the adjudger was not infest during the whole of the forty years that he was in possession. His title, therefore, was not secured by the positive prescription. The judgment is inaccurately expressed also in stating, that because the adjudger was not infest, he could not object the negative prescription against the pursuer. It would have been more correct to have stated, that because the adjudger had not been infest for forty years, he could not object the positive prescription against the pursuer. As formerly shewn, a right of property in land cannot be lost by the negative prescription, although the right to reduce a conveyance proceeding from the pursuer of the reduction or his predecessor, will certainly be lost by the negative prescription, if the grounds of reduction are extrinsic of the conveyance sought to be reduced. If, however, the grounds of reduction are intrinsic of the conveyance, the right to reduce is perpetual.

2. In the case of *PATON v. DRYSDALE*, if the defender's charter of adjudication and infestment were *ex facie* valid, which they appear to have been, and if he had possessed on that title for forty years, it would have been unnecessary for him to have founded on the decree of adjudication which

was the warrant of the charter. His title would thus have been secure by the positive prescription, and being thus possessed of a valid prescriptive title, the warrant of that title did not require to be produced. As, however, the adjudger had not possessed for forty years on his charter of adjudication and sasine, it was necessary for him to produce and found upon the decree of adjudication which connected him with the prior infestment of the pursuer's predecessor. If that decree had been *ex facie* unobjectionable, the pursuer's right to reduce it on extrinsic grounds would have been lost by the negative prescription. On the decree being produced, however, it was found liable to intrinsic objections, and therefore the pursuer's right to reduce it was sustained.

3. The argument for the pursuer in the case of *AINSLIE v. WATSON*, brings out clearly the proper ground on which the judgment of the Court must be held to rest. From the note of the case given by Lord Elchies, it would appear that some of the Court were inclined to have sustained the reduction upon extrinsic as well as upon intrinsic grounds. The ground for this inclination may possibly have been the terms of the judgment, in the case of *PATON v. DRYSDALE*, which case was founded upon by the pursuer, and has been frequently cited as an authority for the position that the negative prescription cannot be pleaded against a right of property, except by a party who has actually

established in his person a title to the positive prescription. The MS. Note by Lord Kilkerran shews, however, that the judgment in the case of *AINSLIE v. WATSON*, proceeded on the principle that the grounds of reduction were intrinsic of the adjudication.

Possession upon a Charter of Adjudication and Sasine, for Forty Years from the Expiry of the Legal, vests an absolute right of Property in the Adjudger, without a Declarator of Expiry of the Legal.

1.—GEDD *v.* BAKER.

Dec. 5, 1740. IN 1690, Agnes Pearson was infeft on a charter of adjudication in certain subjects in Burntisland, the property of the pursuer's grandfather. In 1717, the defender purchased the subjects from the party to whom Pearson had sold them, and was infeft. The pursuer, as heir of the debtor, brought a reduction of the adjudication. The defender pleaded the positive prescription.

ARGUMENT FOR PURSUER. PLEADED FOR THE PURSUER.—The forty years cannot begin to run till after the expiration of the legal of the adjudication, because during the legal the adjudication is but a redeemable right, which becomes irredeemable only upon, and by the expiration of the legal. The years, therefore, during which the right was redeemable cannot be conjoined with the subsequent years to make up a prescription. During the legal, an adjudication is but a disposition *ad effectum* for security of a debt, and to give the adjudger a title to enter into immediate possession, if he pleases, for payment of it. During the legal, it continues a security *pignore pratorio*, but after the ten years it begins to be an irredeemable right. If the adjudication and the grounds thereof are subject to no legal objection, the right is absolutely good the day after the expiry; and if the adjudication is clothed with charter and sasine, and possession, the right is validated by a forty years' prescription, though there may be defects in

the adjudication or grounds thereof. But the ten years during which it is a redeemable right cannot at all enter into the computation of the forty years.

GEDD
v.
BAKER.
1740.

An adjudication in effect contains two sorts of rights. The one is merely a security, to commence immediately after the decree. The other right is an absolute irredeemable right, the commencement whereof is suspended for ten years, till it shall be seen whether in that time the debtor receives the lands by payment, or the adjudger pays himself by intromissions. During the first period, the right is not only redeemable, but if the adjudger enters into the total possession, he is accountable by a rental, afterwards the land is his own. A party pleading prescription, must be able to say that he has possessed the lands *tanquam dominus* for forty years, which he cannot do if to make up forty the first ten years are computed.

An ordinary adjudication is quite different from an adjudication in implement. The latter is every way similar to a voluntary disposition. The defender is bound specifically to dispoise certain lands. This he refuses to do, and the Court does it for him. An ordinary adjudication is also very different from a voluntary disposition, with a temporary *pactum de retrovendo*. In adjudication, the property does not pass from the debtor till the legal is expired; but in dispositions, the property goes to the disposee only under an obligation to dispoise back again; which obligation will be good against singular successors even, if it is *in gremio* of his right, or duly registered. An adjudication bears a reversion *in gremio*, so that the debtor or his heirs cannot be cut off by the negative prescription without forty years' silence after the right became irredeemable. Neither is the positive prescription pleadable where a temporary reversion is stipulated in the right, for during the continuance of the right of reversion there is no need to quarrel the adjudger's right as irredeemable.

PLEADED FOR THE DEFENDER.—The defender and his authors have possessed for forty years on the charter of adjudication, and therefore, in terms of the Statute 1617, he cannot now be disquieted by any person upon any ground. The Statute requires charter and sasine, but it makes no distinction as to the

ARGUMENT FOR
DEFENDER.

GEDD
v.
BAKER.
1740.

grounds upon which the charter proceeds, whether upon a disposition, or resignation, or upon an adjudication. No distinction, therefore, can be made between these cases. Charter and sasine of the property from the superior, upon whatever it proceeds, with forty years' peaceable possession, is declared a sufficient and absolute right by the Statute. An adjudication is an absolute disposition of property, by the law adjudging the debtor's lands to belong to the adjudger. It is in the words and form of an absolute disposition of the lands adjudged in payment of the debt claimed. It is true that the law allows the debtor to redeem his lands by payment of the debt within ten years of the date of the adjudication ; but then, if they are not so redeemed, the right of property is absolute *retro* from the date of the adjudication, and the positive prescription runs from the date of the charter and sasine. The property is conveyed absolutely by the adjudication, but it may be redeemed by payment of the debt within ten years, but there is no redemption competent after that time.

There is a great difference between an adjudication and a disposition in security. An adjudication is like the case of an absolute disposition, with a clause *in gremio de retrovendendo*, upon payment of the price at any time within ten years, but declaring, that after the ten years the purchaser shall not be obliged to redispone. Such a disposition, seeing it contains an absolute disposition of the property, is the foundation for charter and sasine ; and, in case the lands are not redeemed within the ten years, prescription will run from the date of the sasine upon such a charter. A disposition of the kind now supposed is very different from a disposition only in security. The one is a title of property;—the other is not ; and, consequently, the one is the foundation of prescription, if charter and sasine follow on it, though the other be not.

If a debtor could instruct that the debt was paid within the legal, he might be heard ; but there is no room for this. Nor is that the pursuer's plea. He would set up the adjudication by objections against the form of it, and, if possible, reduce it to nothing—a procedure altogether incompetent, as the defender is now secured upon his charter and sasine by the positive prescription. The defender has now no need for the adjudica-

tion. He may, if he please, burn it, or allow certification to pass against it. He is secure upon his charter and sasine, against which nothing can be objected but falsehood. It is only a loose metaphorical way of speaking, to term an adjudication a *pignus prætorium*, for, in its form and nature, it is nowise a disposition in security, or *pignus*, but an absolute conveyance of the property in payment of the debt.

GEDD
v.
BAKER.
1740.

The Lords found,—“ That forty years’ possession on the charter and infestment excluded all objection of nullities against the adjudication or grounds thereof, albeit there had not been forty years’ possession since the expiry of the legal, and found, that the years of minority are to be deducted.”

JUDGMENT.
Dec. 5, 1740.

LORD KILKERRAN appends the following note:—“ N.B. Though there is no doubt but it is competent to allege payment within the legal for forty years after the expiry of the legal.”

Kilkerran’s Decisions, p. 418.

On the Session Papers in the case, LORD KILKERRAN has also written,—“ The Statute introducing the positive prescription is, that a charter and sasine, with forty years’ possession without interruption, give a sufficient right, and secure the possessor against all challenge on any other head than falsehood. A charter of adjudication does, from its date, give a right of property. By our ancient law, an apprising of land for a payment of debt, did immediately transfer the property without any reversion, as much as poinding of moveables transfers the property at this day. True, by the after Statutes, a reversion is given to the debtor within a time certain. That does not hinder the property to be in the meantime with the adjudger, no more than a sale under reversion for a definite number of years excludes the pursuer from the property in the meantime.”

MS. Notes.
Kilkerran’s
Session Papers.

It would appear, however, that Lord Kilkerran afterwards altered his opinion, as stated in this note, for Lord Elchies, in his Decisions, mentions that the judgment was unanimous, with one exception. His note of the case is as follows :—“ An adjudger having obtained charter and sasine, and entered to possession immediately after adjudication, and possessed for more than forty years,—the Lords found, that the adjudication could not be quarrelled upon nullities, though he had not possessed for forty years after the legal. But they thought he might de-

Elchies’ Decisions, vol. ii.
p. 10.

GEDD
v.
BAKER.
1740.

clare the adjudication satisfied, and paid within the legal any time within forty years after the expiry of the legal, though there was no occasion to give an interlocutor on this point. This interlocutor was unanimous, except the Marquis of Tweeddale. Arniston, absent."

II.—CUTLER v. M'LELLAN.

Dec. 9, 1762.

NARRATIVE.

John M'Lellan was infeft, in 1706, upon a Crown charter of adjudication in the lands of Gurchrew. He died in 1724, and the lands continued to be possessed by his heirs. In 1760, the pursuer, as heir of the party from whom the lands were adjudged, brought a reduction of the defender's title. The defender pleaded the positive prescription. The pursuer pleaded minorities, regarding which a proof was allowed. On a proof being led, it was admitted by the pursuer, that the abatement of the minorities was sufficient to elide prescription. The pursuer then pleaded, that prescription could not begin to run till the expiry of the legal; and it was admitted by the defender, that, if that plea were well founded, prescription had not run at the time of commencing the suit, deduction being made for the minorities proved.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The question to be determined is—Whether prescription runs upon an adjudication from the date of the charter and infeftment expedite thereon, or from the expiry of the legal? By the Act 1621, a creditor has no farther right to the lands adjudged, than for payment of his annualrents. It was an heritable subject put into his hands, as a pledge or security for payment of his debt. If the debtor did not take care to have the whole debt cleared within the time fixed for redeeming them, the old idea of an apprising was revived, and the lands were considered as become the absolute property of the creditor, as was the case from the beginning. Until the expiry of the legal, therefore, an apprising is to be considered only as a right in security, and not as an alienation of the property. During the legal the debt still subsists, and

may be extinguished by intromissions or compensation. If the creditor gets payment within the legal, the estate returns to the debtor without any form of law. In order to found prescription, the person who prescribes must have possessed the estate as his own absolute property. This no adjudger can do within the legal. He only possesses the estate as a security for his debt. He has no other right in it but for payment of his annualrent. He can never look upon it as his own property, for he can never be certain but that it may be redeemed the next day. After the legal is expired, the case comes to be very different. If the debt is not extinguished by intromission or compensation, the creditor becomes absolute proprietor. From that period he begins to possess upon a right of property, and has every reason to look upon the estate as his own. Possession for forty years, therefore, after the expiry of the legal, must undoubtedly secure the estate to him by prescription.

CUTLER
v.
McLELLAN.
1762.

PLEADED FOR THE DEFENDER.—There is no substantial ground for distinguishing between charters and sasines proceeding upon adjudications, and charters and sasines proceeding upon voluntary dispositions. Although there is a right of redemption for ten years, yet, after the expiry of the legal, an adjudger is understood to have been owner from the date of the decree, because the legal is no more than a privilege given to the debtor to void the judicial sale by payment, which, if he omits to do, the sale must be considered as absolute, agreeably to the original nature of a decree of apprising. Prescription, therefore, must be held to run upon a charter and sasine, taken upon an adjudication during the legal, in the same manner as it does upon a voluntary disposition, or as it would have done if no legal had ever been introduced. As adjudications are judicial sales in payment, under a condition only of being voided if payment is made within the legal, payment may be made either in the way of intromissions or compensation. The power of extinguishing an adjudication in either of these ways does not impugn the nature of the right, as being a judicial sale in payment under a condition only of being voided, if payment is made within the legal. If satisfaction is made within the legal, it is true that no reconveyance is necessary, because such a satisfac-

ARGUMENT FOR
DEFENDER.

CUTLER
v.
McLELLAN.
1762.

tion has the effect of voiding the right, and rendering it altogether ineffectual. If, then, an adjudication is in law a disposition of land in payment, it necessarily follows that a charter and infeftment upon such a disposition is a title of property, and consequently a title of prescription. It falls to have this effect by the Statute 1617, which does not distinguish infeftments upon adjudications from other infeftments, but makes one general enactment with regard to all.

JUDGMENT.
Dec. 9, 1762.

The Lords Found,—“ That the prescription does not begin to run from the date of the charter and infeftment upon the adjudication, but from the expiry of the legal of said adjudication.”

Brown's Sup-
plement, vol.
v. p. 898.

LORD MONBODDO observes with regard to this case,—“ The Lords in this case were all unanimous, that upon a charter of adjudication, prescription of the absolute irredeemable property could not run, except from the expiration of the legal. If the prescription had been pleaded against any other than the debtor, or his heir, it would, I imagine, have run from the date of the sasine, because the possession of the adjudger in such a case would have been considered as the possession of the debtor. And in a question with anybody, if the adjudger claimed no more by prescription than the redeemable right, the prescription would run from the date of the sasine.”

III.—SPENCE v. BRUCE.

Jan. 21, 1807.
NARRATIVE.

The lands of Flemington were adjudged in 1745, by Thomas Ogilvy of Coull, from the Reverend John Ouchterlonie, and in 1747 he was infeft upon a Crown charter of adjudication. The pursuer, as the heir of the debtor, brought a reduction in 1800 of the defender's title, who had now acquired right to the lands. The defender pleaded the expiry of the legal, and also the positive prescription.

Interlocutor of
Lord Ordinary,
June 24, 1801.

LORD HERMAND, Ordinary, “ Repelled the defences founded

on the expiry of the legal : Found, that prescription only began to run from the year 1757, when the legal expired, and might have been declared."

SPENCE
&
BRUCE.
1807.

On a representation the Lord Ordinary, " In respect of the importance of the cause, made avizandum to the Court."

Avizandum to
the Court,
Feb. 16, 1802.

PLEADED FOR THE PURSUER.—The lapse of ten years from the date of the decree of adjudication, does not vest the adjudger with an irredeemable right of property without a decree of declarator of expiry of the legal. If he does not obtain such a decree the property does not vest, for the expiry of the legal does not vest the estate in the adjudger *ipso jure*. Until the expiry of the legal has been declared, the adjudication is only a mere heritable security created by the Court. It is merely a *pignus prætorium*, and until the expiry of the legal has been declared, the right continues still of that nature. It is not a sale but a *pignus prætorium*, and no continuance of possession or length of time can, *per se*, alter the nature of the right, or change a redeemable right of pledge into an irredeemable right of property. The right of an adjudger, therefore, can never become by prescription a right of property.

ARGUMENT FOR
PURSUER.

The Statute 1617 only confirms, in consequence of the possession, the right of the possessor, whatever that right may be. If the person in whose favour it operates was formerly the proprietor, it secures his property from future challenge. If it was a right of *pledge*, it makes that right unexceptionable, but it does not erect it into a new and superior right, widely different in its nature and effects from the original right. If it was an adjudication, it secures that adjudication from being set aside on grounds which might have been successfully urged during the currency of the prescriptive possession, but it remains an adjudication still, that is a *pignus prætorium*, and cannot be transformed into a different right without the interposition of legal authority. Without some judicial act, adjudications must always remain mere heritable securities, and the positive prescription can no more transform a *pignus prætorium* into a right of property, than it can do so with regard to a *pignus conventionale*.

SPENCE
v.
BRUCE.
1807.
ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The defender's right is unchallengeable in virtue of the charter and sasine expedite in 1747, and the possession that has followed upon that title since that date. The defender's title is thus fortified by the positive prescription. The prescription ought to be held as commencing on March 30, 1747, which was the date of the charter of adjudication. It is immaterial, however, whether the prescription be held to commence at the date of the infeftment in the charter of adjudication, or at the date of the expiry of the legal. The decree of adjudication was obtained in 1745; the legal consequently expired in 1755. Whether, therefore, the prescription is held to commence at 1747, the date of the infeftment, or at 1755, the date of the expiry of the legal, or at 1757, ten years after the date of the infeftment, still the period of prescription is complete. The present action not having been raised till 1800, there has been a full period of forty years of possession proceeding upon charter and sasine.

JUDGMENT.
Jan. 21, 1807.
MS. Notes.
Sir Hay Camp-
bell's Session
Papers.

“The Lords sustained the defence of positive prescription.”

LORD PRESIDENT CAMPBELL, on the Session Papers in this case, has written,—“Ogilvy of Coull's adjudication for himself, and as trustee for a variety of creditors, with the charter and sasine upon it in 1747, was a clear title for positive prescription, and it seems immaterial whether in this case it shall run from the date of infeftment, or from expiry of the legal. The former has generally been understood, though the latter may perhaps be more consonant to the nature of a general adjudication.”

IV.—ROBERTSON v. THE DUKE OF ATHOLE.

May 10, 1815.

NARRATIVE.

In 1673, Alexander Robertson of Lude, the great-great-grandfather of the pursuer, died infeft in the lands of Clunes and Strathgroy, and also in the lands of Inchmagrenoch. In 1677, these lands were adjudged by Alexander Robertson of Fascally, by a decree *cognitionis causa*—the son of Robertson of Lude having renounced to be heir. Upon this adjudication

the adjudger was never infest in the lands of Clunes and Strathgroy, but in the same year in which the adjudication was obtained he was infest in the lands of Inchmagrenoch, upon a charter of adjudication from Gilbert Stewart, Prebend of Dunkeld, as superior of the lands. The adjudger entered into possession of all the lands adjudged.

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

In 1688, the adjudger conveyed his adjudication to the Marquis of Athole. The Marquis took no infestment on the conveyance from the adjudger, but in 1690, he executed a deed of entail, in which the lands of Inchmagrenoch, and Robertson of Fascally's adjudication thereof were conveyed. No mention was made in the entail, or in the charter or infestment which followed upon it, of the lands of Clunes and Strathgroy.

In consequence of the abolition of Episcopacy at the Revolution, the lands of Inchmagrenoch, which formerly held of a Prebend, came to hold of the Crown. They were accordingly included in the Crown charter, which was obtained by the Marquis of Athole in 1691, proceeding upon the deed of entail of 1690. The charter, so far as related to the lands of Inchmagrenoch, proceeded upon the procuratory in the adjudger's disposition, and the assignation thereof contained in the deed of entail. The lands of Clunes and Strathgroy were not mentioned in the charter. In the subsequent titles, the right of the family of Athole to the lands of Inchmagrenoch was described in the same manner as in the charter 1691, and in none of these titles were the lands of Clunes and Strathgroy mentioned. These lands, however, were formerly held of the Athole family, as forming part of the Earldom of Athole, and the Earldom of Athole was comprehended in the charter passed by the Marquis of Athole in 1691.

In 1803, the pursuer having obtained himself served heir of line to Alexander Robertson, who died last infest in all the said lands, brought two actions of reduction, the one relating to the lands of Clunes and Strathgroy, and the other to the lands of Inchmagrenoch. The defender produced the charter obtained by his predecessor in 1691, which comprehended the Earldom of Athole, and also the lands of Inchmagrenoch specially mentioned, and founding upon that charter, he pleaded a title to exclude.

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.
ARGUMENT FOR
PURSUER.
THE LANDS OF
CLUNES AND
STRATHGROY.

PLEADED FOR THE PURSUER.—The lands of Clunes and Strathgroy are not mentioned in the charter of 1691, founded on by the defender. The charter contains the general name of the *Comitatus de Athole*. The lands in question, however, do not form part of the Earldom of Athole. The charter contains the special names of the particular lands which compose that Earldom. No other lands can be held as comprehended within the Earldom except those which are specially named. Were it otherwise, it would be impossible to know how far the general term of Earldom extended. At all events, no lands can be held as comprehended in the Earldom, but such as at some former period, and by an express charter, had been united in and incorporated as parts of it. It is incumbent, therefore, on the defender to produce some previous charter, showing that the lands in question were united and incorporated as parts of the Earldom of Athole.

But even if it could be shown that the lands in question were contained in the charter of 1691, either under a special or a general name, this would not establish the defender's plea of a title to exclude. The charter could only have conveyed the superiority of the lands in question, as the property or *dominium utile* of the lands belonged to the predecessors of the pursuer. Alexander Robertson, one of the pursuer's predecessors, was infeft in the lands in 1642, on a precept from the Earl of Athole, and died last vest and seised in 1673. The *dominium utile* of the lands remained in *hæreditate jacente* of Alexander Robertson in 1691, and remains so still, nor can it be lost or extinguished by any length of time, as a right of property is not affected by the negative prescription. Neither could it be extinguished and consolidated with the superiority, unless some person had been regularly infeft in the base fee in right of Alexander Robertson, and had then resigned the base fee *ad perpetuam remanentiam* in the hands of the superior. Neither of these acts ever took place. There has been no infeftment in the base fee since the death of Alexander Robertson, and no resignation *ad remanentiam* in the hands of the superior. A consolidation of property and superiority does not take place *ipso jure*. In order to effect a consolidation, a resignation *ad remanentiam* is absolutely necessary.

The defender's plea, that the pursuer is not entitled to assert that the property in the lands in question belonged to his predecessors at the date of the charter 1691, because, in order to prove the assertion, it is necessary for him to go back for more than forty years, during which period the family of Athole have been in quiet possession, is a mere begging of the question raised by the pursuer. That question is,—Whether the charter 1691, if it contained the lands in question at all, conveyed the property, or only the superiority of them? The pursuer has produced evidence to show that the property of these lands did at that period belong to his predecessors, and that therefore it could be the superiority only which was contained in the charter 1691. In opposition to this evidence, he is met, not with a denial in point of fact, but with an argument in point of law, to the effect that the Statute 1617 will not allow him to make such an averment, or to produce evidence to establish it. The pursuer, however, submits that he is entitled to make such an averment, and to prove it. And if the averment is proved, it is incumbent on the defender to show how he obtained a title to the property.

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

To obviate the difficulty now stated, the defender farther pleads, that, although his title was originally a title to the superiority, it has been converted into a title to the property also by the positive prescription, in consequence of the possession that has been enjoyed since 1691. The defender's predecessor, however, in 1691, had two distinct rights in his person. He had the fee of the superiority, which was his only proper right under the charter and infeftment of 1691. He had also a personal redeemable right to the property, in virtue of the conveyance of the adjudication against the lands, which was obtained by Robertson of Foscally. The entry to possession of the property was upon the adjudication or personal redeemable right. The rule of law is, *QUOD NEMO POTEST MUTARE CAUSAM POSSESSIONIS SUÆ*. The defender's predecessors, therefore, must be held to have possessed upon the adjudication all along, and thus never to have possessed upon the title of superiority. From this it follows, that as both a title and possession are necessary to make up a prescriptive right, the family of Athole could have acquired no right to the property, even if the infeftment in the

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

superiority were a title upon which right to the property could be prescribed.

If, in place of entering to possess upon a legal redeemable right by adjudication, the defender's predecessor had entered to possession upon a redeemable right of wadset, it could not have been maintained, that by the possession being continued for more than forty years, the right of the reverser under the wadset would have been extinguished, on the ground that a prescriptive right to the property had been acquired under the infestment of superiority. Such a plea would have been successfully met by the counter plea, *NEMO POTEST MUTARE CAUSAM POSSESSIONIS SUÆ*. As the possession had commenced upon a wadset right, the defender's predecessor would have been held to have possessed upon that right all along, and would not have been allowed to invert the possession by ascribing it to the title of superiority for the purpose of defrauding the reverser. Between a wadset right and an adjudication, in this respect, there is no difference. A superior entering to possession upon an adjudication can no more be allowed *mutare causam possessionis*, by pretending to ascribe his possession to his title of superiority, for the purpose of defrauding the party who has the right to the reversion under the adjudication, than he could do so when he enters upon a wadset right for the purpose of defrauding the person who has the right of reversion under the wadset. It is now settled law that the legal of an adjudication never expires till a declarator of expiry of the legal is brought to warn the reverser, and to call upon him to redeem, if he thinks proper. There appears, therefore, to be no difference between the right of a reverser under a redeemable right of adjudication before declarator, and the right of a reverser under a redeemable right of wadset.

As, therefore, the family of Athole had two titles in their persons, the title of superiority and the redeemable right of property under the adjudication, and the possession having commenced, and having all along continued, under the last title, there cannot be any prescription of the property under the title of superiority, because there was no possession under that title. The title by adjudication is liable to intrinsic nullities, and besides, no infestment ever followed upon that

title, so that the pursuer's right to redeem the lands remains entire.

With regard to the lands of Inchmagrenoch, it is true that they are mentioned in the charter 1691. But they are described there as lands to which the defender's predecessors acquired right by a conveyance of an adjudication led against the lands by Robertson of Fascally. No decree of declarator of expiry of the legal of this adjudication was ever obtained. The right of the defender to these lands, therefore, rests on the foundation of an adjudication without any decree of declarator of expiry of the legal. The adjudication, therefore, is still redeemable by the pursuer, as the heir of the true proprietor, on payment of any balance which may be due, or, if the debt is already satisfied, the pursuer is entitled to have the adjudication declared extinguished, and to recover his lands.

As, therefore, the defender's right is nothing more than an infestment on an adjudication, his attempt to exclude the pursuer, who is the reverser under the adjudication, on the plea of a title to exclude, cannot be sustained. That plea is contrary to the nature of an adjudication. An adjudication and infestment on an adjudication are by their nature mere redeemable rights. No possession upon them, therefore, however long continued, can ever exclude the reverser, until the right of redemption is foreclosed. But the right of redemption cannot be foreclosed without a decree of declarator of expiry of the legal at the instance of the person in right of the adjudication against the original debtor or his heir having right to the reversion.

The charter of 1691 is a mere renewal of the infestment of Robertson of Fascally on the adjudication obtained by him. The charter proceeds upon his procuratory, and describes the lands as lands adjudged from the pursuer's predecessor. It bears *in gremio* the character and description of a mere right of adjudication, and no length of possession can alter the nature of the right upon which a right of possession is founded.

It is pleaded by the defender, that where infestment follows upon an adjudication, a declarator of expiry of the legal is not necessary, but an infestment upon an adjudication does not alter the nature of the right. It is still a redeemable right, and until a declarator of the expiry of the legal is obtained, the

ROBERTSON
OF
THE DUKE OF
ATHOLE.
1815.
THE LANDS OF
INCHMAGRE-
NOCH.

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

right of redemption is not foreclosed. The pursuer is therefore entitled to call for production of the adjudication, and to object intrinsic nullities to it. On this being done, the adjudication will necessarily fall to be reduced. Nothing but a decree of declarator of expiry of the legal can bar the pursuer from calling for production of the adjudication.

ARGUMENT FOR
DEFENDER.
THE LANDS OF
CLUNES AND
STRATHGROY.

PLEADED FOR THE DEFENDER.—The first question is, Whether the lands in question form part of the Earldom of Athole included in the defender's titles? That Earldom comprehends lands of great extent, and passing under a variety of denominations, none of which are specially mentioned in the charter 1691. The lands *nominatim* mentioned in the charter are not part of the old Earldom, but are lands acquired at subsequent periods and added to the Earldom. There can be no question, that the lands in question have been possessed as parts of the Earldom for a course of several centuries without challenge or interruption. The pursuer's averment, that they do not form part of the Earldom of Athole is contradicted by his own titles, and is inconsistent with his own Summons. They are described in the Summons, as "lying within the Earldom of Athole and Sheriffdom of Perth." The titles too, produced by the defender, clearly establish the fact that they are parts of the Earldom.

The second question is, Whether the property of the lands in question belong to the defender? The pursuer's argument upon this question is directly contrary to the received doctrine of the law of prescription, and indeed to the very terms of the Act 1617. To every one of the pursuer's arguments, that Statute affords a sufficient answer. The pursuer avers, that at the date of the charter 1691, the family of Athole had right only to the superiority, and not to the property of the lands. But in making this averment, the pursuer is going beyond the forty years, during which the family of Athole have been in the continued possession of the lands in virtue of titles of absolute property. The pursuer farther avers, that the property or *dominium utile* of the lands in question, belonged to his predecessors, and was vested in the person of Alexander Robertson. In order, however, to prove this averment, it is necessary for the pursuer to go back upwards of a century, during which the

family of Athole have been in the continued possession of the lands. Neither the pursuer's averments, nor any proof of them, which can possibly be brought, can be received without overturning altogether the law of prescription. That law supposes the possessor of lands to be the proprietor, and to have been so from the date of his title downwards. No proof of the contrary can be received, to the effect of overturning the *presumption juris et de jure*, arising from the continued possession for forty years.

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

The pursuer farther avers, that the defender's predecessors acquired possession of the lands in virtue of adjudications. Founding then on the maxim, NEMO POTEST MUTARE CAUSAM POSSESSIONIS SUÆ, he contends that the possession must be ascribed to the title of adjudication, and not to the title of absolute property, which was in the person of possessor. It is submitted, however, to be clear, that an adjudication followed by infetment and continued possession for forty years, is sufficient to found the plea of prescription. The pursuer, too, cannot prove his averment without going beyond the period of forty years, within which period all his allegations and proofs must be confined.

The maxim founded on by the pursuer, is a maxim of the Roman law, and was never received into the law of Scotland, and in a question of prescription is altogether inapplicable. "By the usage of Scotland," Mr. Erskine observes, "one may ascribe his possession to any right whatever in his person, though acquired by him after his beginning to possess, as he shall judge most for his advantage." When a party has several rights in his person, prescription cannot be pleaded against any of them by a third party, because possession is available to the possessor on every right in his person.

It is a mistake, however, to consider the family of Athole as having two titles in their persons to the lands in question. So far as appears from the charter of 1691, and so far as can be inquired into, without going back beyond the years of prescription, the defender and his predecessors have only one title to the lands. That title is an absolute one, both to the property and superiority, and having been followed by possession for more than forty years, without challenge or interruption, it is

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.
THE LANDS OF
INCHMAGRE-
NOCH.

now as unchallengeable as any prescriptive right can possibly be.

With regard to the lands of Inchmagrenoch, these are *no-minatim* mentioned in the charter 1691. They are also *no-minatim* mentioned in the retour 1725, of the service of James Duke of Athole, and in the instrument of sasine in his favour following upon the retour. The sasine of 1725, along with the subsequent sasines in favour of the succeeding Dukes of Athole, establish in the defender a prescriptive right to the lands in question. The situation in which the lands stood prior to 1725, and the mode by which they were acquired by the defender's ancestor, are matters into which the pursuer cannot be allowed to inquire. All such inquiries are barred by the continued possession which has since taken place, for a period far exceeding the years of prescription.

The pursuer avers, that the lands in question were acquired by adjudication. Allowing this to be the case, infestment, however, was taken upon the adjudication, and the infestment was followed by continued possession for more than forty years, even after the expiry of the legal. An adjudication clothed with infestment, and followed by such possession, affords a prescriptive right to lands, which bars all challenge of the adjudication, and renders it impossible to require production of the grounds upon which it proceeded. This has hitherto been an admitted point.

As to the case of Campbell *v.* Scotland, all that was determined in that case, was, that the bare expiry of the legal did not vest the estate *ipso jure* in the adjudgers without a decree of declarator. The difference between that case and the present, consists in this, that the period of prescription was not elapsed in that case, and that it is elapsed in the present.

Interlocutor of
Lord Ordinary.
June 18, 1806.

LORD GLENLEE, Ordinary, " Found that the defender has produced sufficient evidence to exclude ; therefore dismisses the process, and decerns."

JUDGMENT.
Feb. 16, 1808.

The case being afterwards submitted to the review of the Court, their Lordships pronounced the following interlocutor :—
" Having advised the mutual memorials for the parties in this

cause, the Lords adhere to the interlocutor of the Lord Ordinary, of date the 18th day of June 1805; find the pursuer liable in the full expense of extract, but in no other expense, and decern."

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

LORD JUSTICE-CLERK HOPE.—"It is objected that the charter 1691 is of superiority. That I don't understand; it is a charter of the lands. What it carries will depend on possession and existence of subaltern rights. Here is possession of the lands on the charter, which thus carries the lands. Even if there had been a subaltern right in the Duke's family, the possession would be attributed to the fundamental right, and would extinguish the inferior right."

OPINIONS.
MS. Notes.
Baron Hume's
Session Papers.

LORD HERMAND.—"In the estimation of law, the property is a mere incumbrance on the superiority. Possession is attributed to the fundamental titles. To hold otherwise, would subvert the whole law of prescription. *Nemo mutare potest causam suae possessionis*, is good Roman law, but very bad Scots law. May attribute his possession to the most beneficial title."

LORD NEWTON.—"I am clearly of the same opinion. Lands are in the deeds, and possession has followed."

LORD PRESIDENT CAMPBELL.—"Infestment in lands covers all. Has also an adjudication in his person, and legal expires. In such a case, has he need of declarator of expiry of legal, being superior as well as adjudger? No. Would have been very unadvisable thus to rest on the expired legal only, instead of his fundamental right. Is clear, positive prescription on the charter of the lands. Is clear, in point of fact, that the old Earldom is contained in the titles, along with other lands. The law ascribes the possession to the title. The fact of possession and the title, are all that the Statute requires. Law does the rest."

On the Session Papers in the case, LORD PRESIDENT CAMPBELL has written,—"Exclusive title. The interlocutor is clearly right. As to Inchmagrenoch, these lands being expressly in the charter and sasine 1691, and there is no interruption of the prescription alleged. It is likewise right as to the other lands, if they make a part of the *comitatus*, and hold of the Duke of Athole as superior, which seems to be proved. See case of DUN-

MS. Notes.
Sir Hay Camp-
bell's Session
Papers.

ROBERTSON
v.
THE DUKE OF
ATHOL.
1815.

MORE v. MIDDLETON. The fact of possession is not disputed ; and this, with charter and infestment, is sufficient. No inquiry into the *initium possessionis*. In case of BALD v. BUCHANAN, there was no room for the plea of prescription. A charter of adjudication is clearly a good title for positive prescription. See case of MACLEAN v. DUKE OF ARGYLE. See also Kilkerran, *vide* Prescription, p. 418."

May 17, 1808.
MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

The pursuer having reclaimed, his petition was refused.

On the reclaiming petition LORD PRESIDENT CAMPBELL writes,—
" Exclusive title—*Summo jure* an adjudication becomes an absolute title of property after a certain time, and therefore stands on a different footing from tacks, liferents or wadsets. According to the petitioner's argument, a charter of adjudication and infestment would not be a prescriptive right, and secure after forty years' possession. A superior is proprietor as to all except his vassal. When he acquires his vassal's right, he stands upon his original infestment, and has no occasion to renew it. He may acquire it by purchasing expired apprisings and adjudications. In this case, the defender has possessed far beyond the years of prescription, whether we count from the date of the charter and sasine, or the expiry of the legal. See Kilkerran, p. 418. In cases of positive prescription, we cannot inquire into the *initium possessionis*, where both a clear title is produced and possession has been held for forty years. It is enough that he possess *tanquam dominus*. See case of BRUCE OF KINROSS, December 6, 1770 ; also case of CAMPBELL OF OTTER, House of Lords, February 10, 1770 ; and case of M'LEAN v. DUKE OF ARGYLE, House of Lords, February 26, 1779."

Journals of the
House of
Lords, May 10,
1815.

On appeal to the House of Lords, it was ordered and adjudged,—“ That the said petition and appeal be, and the same is hereby discharged the House ; and the said interlocutors be, and are hereby affirmed.”

Nov. 30, 1814.
Dow's Reports,
Vol. iii. p. 112.

LORD CHANCELLOR ELDON observed,—“ The first of these cases is one in which there was an adjudication with no infestment upon that adjudication, but where there was a Crown charter and more than forty years' peaceable and uninterrupted possession ; and the question is, whether the Crown charter, connected with

the adjudication and possession, forms a good title by prescription. The other is a case in which, independent of the Crown charter, there was an adjudication followed by infestment, but no declarator of the expiry of the legal, though there was an adverse possession for forty years subsequent to the period of the expiry of the legal, and the question was, Whether there too there was a good title by prescription? If there were a necessity for deciding these cases now, I should say that my opinion, my individual opinion is, that both of these cases are rightly decided. But it is not my intention to move your Lordships to go to judgment on either of them now, for this reason, that while with respect to a point upon which one would think there could be no more doubt in the law of Scotland than there can be that this table stands here—I mean the question whether an adjudication with infestment and forty years' possession after the period of the expiry of the legal, without any declarator of the expiry of the legal, forms a good title by prescription—it has been on one side roundly asserted at the bar, that it is not a good title by prescription; it has been on the other side positively asserted that it is a good title by prescription, and universally known to be so. And yet in point of actual authority brought before us, it is a little difficult to decide which side asserts rightly. Wherever a case is so circumstanced with respect to the law of Scotland, I have always felt it, since I have had the honour of giving your Lordships advice on these subjects, a positive duty imposed upon me to prosecute to the utmost those inquiries which I have it in my power to make, in order to ascertain how the matter really stands. And, therefore, though my own opinion at this moment is—I desire nevertheless it may be understood that it is an opinion subject to correction—that in the one case the adjudication with the Crown charter and possession, and in the other the adjudication with infestment and forty years' possession after the period of the expiry of the legal, though without declarator, do make a good title by prescription, yet it is not my intention to move your Lordships so to decide till we meet again; and if in the interim I should see any reason to alter my opinion, I shall then most readily state to your Lordships the grounds of the opinion I have this day given, and the reasons which have induced me to change it. It may, perhaps, be right, however, to

ROBERTSON
C.
THE DUKE OF
ATHOLE.
1815.

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

say that I really cannot perceive where, in what statute at least, is to be found prescribed the necessity for that declarator of the expiry of the legal ; and, speaking by analogy with reference to what passes in our own Courts, if you can consider an adjudication as in the nature of a mortgage, the practice is familiar enough. By our mortgages the money is to be paid within a given time ; and if it be not paid within the time, the instrument upon the face of it declares that the title of the mortgager is gone. But we nevertheless hold that the title of the mortgager is not gone without a judgment of a Court of Equity that it is gone. And, accordingly, when a party wishes to have that title, which upon the face of it is declared to be absolute, in substance and in fact absolute, he applies to a Court of Equity for—I may use the very words—a declarator of the expiry of the legal ; that is, to have it declared that if the other party does not pay the money in six months he is totally foreclosed, and that which is described in the instrument as a legal title shall be considered as an equitable title also. But where length of time is to form the title, although there be no such decree of foreclosure, no such declarator, if I may say so, of the expiry of the legal, yet if there is an adverse possession for twenty years, that shuts out all question, and dispenses with any such decree or declarator ; and my present impression is, that it may be so in Scotland, I say my present impression, guarding myself to the extent I have done.”

May 10, 1815.
Dow's Reports,
Vol. iii. p. 115.

On a subsequent occasion, LORD CHANCELLOR ELDON farther observed,—“ There are two cases, in which General Robertson of Lude is appellant, and the Duke of Athole is respondent, and which were heard previous to the Christmas recess, now standing for your Lordships' judgment ; both of them raising questions of very great importance with respect to the law of Scotland ; the one relative to the title to an estate called Inchmagrenoch, or some such name, the other relative to the title to two estates called Clunes and Strathgroy, where, as your Lordships will recollect, the argument turned principally on the effect of forty years' possession under titles originating in adjudication, in the one case followed by infeftment, in the other, as was contended, not followed by infeftment. And the question was, Whether the Duke of Athole had in both cases acquired

a good title to the lands in question ? I hinted to your Lordships on a former occasion, the inclination of my opinion that the judgment of the Court below was correct. But I thought it my duty, before calling upon your Lordships to come to a final decision upon these cases, to make such farther inquiry as appeared to me to be useful, considering the importance of the points which occurred in these causes ; and I accordingly solicited assistance in a way which I believe has not been unusual with those who have held the situation which I have at present the honour to hold ; and I have also perused very important papers submitted to me in another way. And upon the best consideration which I have been enabled to bestow upon these causes, and I can assure your Lordships I have bestowed a great deal upon them, I cannot offer your Lordships my advice to reverse either of these judgments. I see by the papers that costs have been claimed in both cases ; but where points of so much importance arose for consideration, I cannot say that it was at all improper to bring these cases before your Lordships for your opinion ; and therefore I should propose to your Lordships to affirm the judgments, but without costs."

ROBERTSON
v.
THE DUKE OF
ATHOLE.
1815.

1. In the case of **JOHNSTON v. BALFOUR**, June 7, 1745, infestment was taken on a charter of adjudication several years after the expiry of the legal, and possession having followed for more than forty years on the infestment, it was found that the defender had produced a sufficient title to exclude the heir of the reverser. In the case of **CAITCHEON v. RAMSAY**, January 22, 1791, a similar title was sustained.

2. The case of **ROBERTSON v. THE DUKE OF ATHOLE**, is not properly a case of prescriptive possession upon a charter of adjudication. The adjudications which

formed the original titles by which the Athole family acquired possession of the lands in question, did not require to be produced or founded upon at all. The title to both sets of lands was an absolute and irredeemable title. With regard to the lands of Clunes and Strathgroy, the charter of 1691 did not mention them at all, and the fact of the property of these lands having been acquired by adjudication did not appear *ex facie* of the charter. The lands having formerly held of the Athole family as superiors, and being part of the Earldom of Athole, the conveyance, in the charter, of that Earl-

dom was sufficient to comprehend these lands without any specific mention being made. These lands were held, therefore, by the Athole family not on a charter of adjudication, but on a title absolute and irredeemable. The same observation is applicable to the lands of Inchmagrenoch. They were expressly mentioned in the charter 1691, and described as having been acquired by virtue of an adjudication. But this description of the manner in which the lands were acquired did not constitute a charter of adjudication. The conveyance of these lands in the charter was heritably and irredeemably, and it is on the terms of the conveying clause in a charter, that the nature of the charter depends. The Athole family, therefore, having possessed both sets of lands on an absolute and irredeemable title;

the question, whether an absolute title can be established by uninterrupted possession for forty years after the expiry of the legal on a charter of adjudication, did not properly arise.

3. The question has been sometimes raised, Whether prescriptive possession should not begin to run from the date of the infestment on the charter of adjudication, and not from the expiry of the legal, where the infestment has been expedite within the legal? This, however, would be unjust, as it would enable the adjudger to prescribe in the face of his own title. The title by adjudication is subject to the statutory right of reversion. During the legal, the adjudger possesses *tanquam hypothecarius*. It is only after the expiry of the legal that he begins to possess *tanquam dominus*.

A Conveyance, after the expiry of the legal, to an onerous singular successor, by the creditor obtaining the first effectual adjudication, will not prejudice the right of adjudgers prior to or within year and day of that adjudication.

BARCLAY v. CREDITORS OF CRIMONMOGAT.

June 23, 1720.

NARRATIVE.

THE lands of Crimonmogat belonged originally to John Hay. In 1654, they were adjudged from him by Patrick Barclay of Towie. In the same year the lands were again adjudged by Peter Meldrum, who was also in the same year infest on a charter of adjudication under the Great Seal. In 1675, being eleven years after the expiry of the legal, Meldrum conveyed the lands heritably and irredeemably to a third party, William Hay, who was infest on a Crown charter in 1677, on Meldrum's resignation. A ranking and sale of the estate was afterwards brought

by the creditors of Mr. Hay and his son. In the process of ranking, the grandson of Mr. Barclay compeared and craved preference upon his grandfather's adjudication. The creditors of Mr. Hay pleaded prescription, but this plea was repelled in consequence of interruptions by minorities. They then objected to Barclay's right to compete with them on the ground of the latency of the adjudication founded on by him.

BARCLAY
v.
CREDITORS OF
CRIMONMOGAT.
1720.

PLEADED FOR THE PURSUERS.—The compearer's adjudication was never completed by infetment. It is only upon the Act 1661 that the adjudger claims. The ground of his claim is, that he is entitled to the benefit of the infetment expedie by Meldrum on his adjudication. The compearer, however, cannot now, so long after the expiry of the legal, compete with singular successors who derive their right from the first effectual adjudger.

ARGUMENT FOR
THE PURSUERS.

If a voluntary disposition had been granted by the party against whom the compearer's adjudication was deduced, the latency of his adjudication would have precluded a reduction at the compearer's instance of the voluntary right. But if a voluntary right would have excluded the compearer's adjudication, in consequence of its having been latent for so long a time, there is the same ground for his adjudication being excluded by the conveyance granted by Mr. Meldrum. The reason why voluntary rights exclude latent adjudications, is the security of purchasers. Purchasers perceiving the right of the lands to be conveyed through many hands without any incumbrance or diligence, judge that they contract safely, there being no charter or sasine upon any record. If after so long a time a party is allowed to quarrel absolute and irredeemable transmissions of land, the authority of the records, and the security thence arising to purchasers, will be weakened and impaired.

The adjudication obtained by Meldrum is not in the field, and the pursuers have no interest in it. They contracted with a person standing infet in the absolute property of the lands. They neither saw nor could see any incumbrance on his right upon record, the adjudication founded on by the compearer being latent without any diligence or infetment upon it. That adjudication ought not now to be brought in to disquiet lawful pur-

BARCLAY
v.
CREDITORS OF
CRIMONMOGAT.
1720.

chasers *bona fide*. For, in the present case, the competition is not between two comprisers, but between a purchaser *bona fide* with infestment and long possession, and one founding on an old adjudication, upon which no diligence was done, and who was never infest thereon, but who only claims the benefit of the first effectual adjudication.

The Act 1661 was never intended to authorize the supine negligence of a creditor who having done one step of diligence to comprise his debtor's estate, should ever after be silent. It is too late for an adjudger to come forward after the first effectual adjudication has become a right of property in respect that the legal has expired, and the creditor has conveyed the lands to an onerous singular successor, and that party has been infest on a charter heritably and irredeemably. Apprisings within year and day come in *pari passu* with the first effectual adjudication only while the legal is current. To entitle the several adjudgers to acquire a right of property after the legal, they ought to expedite infestments on their several adjudications. After the expiry of the legal, an adjudger becomes a proprietor, and is no longer considered as a creditor. After the expiry of the legal, therefore, third parties may lawfully purchase, and it would weaken extremely the security of purchasers if such collateral's rights as that founded on by the compeerer should be admitted, seeing that there are no means to discover such incumbrances.

ARGUMENT FOR
COMPEARER.

PLEADED FOR THE COMPEARER.—The pursuers of the present ranking derive their right from the conveyance by Meldrum. The infestment on Meldrum's adjudication is, in law, the same as if it had been upon the adjudication founded on by the compeerer. The only question then is, Whether any specialty arises from the fact, that the charter and infestment which constituted the first effectual adjudication did not proceed directly upon the compeerer's adjudication, but upon that obtained by Meldrum? The Act 1661 declares that all comprisings deduced before the first effectual comprising, or after, but within year and day of it, shall come in *pari passu* together, as if one comprising had been deduced and obtained for the whole respective sums contained in the comprisings. According to the words of

the Statute, therefore, there can be no question but that the charter and infestment taken by the first adjudger accrues to him who adjudges within year and day.

BARCLAY
v.
CREDITORS OF
CROMMOGAT.
1720.

The difference alleged to exist between a charter taken before the expiry of the legal, and one taken after it, is altogether groundless. The Act makes no such distinction. An apprising, after the expiry of legal, even without an infestment, is changed into a right of property in a question with the debtor. But in a competition with co-apprisers, they are no more but so many several creditors *missi in possessionem*, and by the law, the deed of one accretes to the rest, especially as to the matter of their infestment, which, by the Statute, is designed to be a common right. There is no foundation for the plea that it is incumbent upon the co-adjudgers to claim the benefit of the charter, and that their delaying is a negligence which may give preference to the singular successors of the appriser infest. The law has fixed no time for making such a claim. By the Statute, the infestment on the first effectual adjudication is effectually made the co-appriser's, just as much as if it had followed upon his own apprising, and therefore, though the first apprising should fail, or be extinct, or be renounced, yet the charter will subsist to the other co-adjudger. Nothing can exclude this privilege, except what will exclude the apprising itself, namely, prescription.

As to the inconvenience urged by the creditors, that it would be unsafe to purchase from any person who had right by apprising, or even from persons who had absolute rights, because, perchance, some time or other, they might have been founded on comprisings, the answer is—*INCOMMODUM NON SOLVIT ARGUMENTUM*. No laws can be made so perfect as to meet every inconveniency. Every one who purchases upon an apprising has an open intimation made to him that he is purchasing *cum periculo*, and particularly with this intimation, that he may have competing apprisings to deal with. It is rarely that an estate is carried off without more than one comprising, so that the very nature of the right speaks loudly to him without any other certioration.

The Lords found,—“ That the privilege introduced by the Act

JUDGMENT.
June 23, 1720.

BARCLAY
v.
CREDITORS OF
CRIMONMOGAT.
1720.

of Parliament 1661, in favour of adjudgers before or within year and day of the first effectual apprising, is competent to the said adjudgers before or within year and day, against the singular successors of the first effectual appriser, as well after the expiry of the legal as within the same."

An Adjudication without Infestment does not exclude a subsequent Infestment proceeding on a prior Voluntary Right.

STIRLING v. THE ANNUALRENTERS OF BALLAGAN.

Feb. 26, 1724.
NARRATIVE.

THE estate of Ballagan having become the subject of a ranking and sale, a competition arose between the adjudgers of the estate, who had charged the superior, but whose adjudications had not been completed by infestment, and those creditors who had been infest in the estate after, but whose rights had been granted prior to, the date of the adjudications.

ARGUMENT FOR
ADJUDGERS.

PLEADED FOR THE ADJUDGERS.—The question is, Whether prior adjudications, with a charge against the superior, are not preferable to posterior infestments on voluntary rights? There seems to be no difference whether the right on which infestment is taken is prior or posterior to the adjudication. The infestment being posterior to the adjudication and charge, it matters not when the right was granted. The right takes its force and strength from the infestment. If, therefore, a right prior to the adjudication, with an infestment after the adjudication, is preferable to an adjudication and charge, the same ground will give preference to a voluntary right after the adjudication, if the voluntary right is followed by infestment.

The adjudications in question were completed by a charge against the superior. The Act 1661 makes an adjudication with a charge equal to an adjudication with an infestment upon it. If, therefore, an adjudication with infestment would be preferable to a posterior infestment on a voluntary right, so also should an adjudication with a charge be preferred.

No infeftment on a voluntary right, taken by a creditor posterior to the diligence of another creditor, can prejudice that creditor's diligence, especially where the infeftment on the voluntary right is taken, as in the present case, during the dependence of a process of sale of the subject in question.

STIRLING
v.
THE ANNUAL-
RENTERS OF
BALLAGAN.
1724.

PLEADED FOR THE ANNUALRENTERS.—An adjudication with a charge is only a step of diligence, but no complete right. The debt due to the annualrenter was prior to the adjudication. The adjudger, therefore, cannot reduce the annualrenter's infeftment, because an adjudication with a charge is not a real right. It is carried by a general service, and cannot compete with an infeftment which gives a real right.

ARGUMENT FOR
ANNUALRENT-
ERS.

The Act 1661 makes an adjudication with a charge a good ground of preference with respect to creditors who have diligences of the same nature. But it does not give an adjudication with a charge any force against a voluntary right completed by infeftment. A charge is made equal to an infeftment, to the one effect only of bringing in adjudgers within year and day *pari passu*. It cannot, however, be held equal to an infeftment in a competition between an adjudication upon which no infeftment has passed, and an heritable security which has been made real by infeftment; for if the heritable security was before the adjudication, the infeftment made the debt preferable, as was found in the case of Justice *v. Aikenhead*.

The Lords found,—“ That the heritable bonds and writs in favour of the annualrenters and infefters being prior to the adjudications, the infeftments on the rights of annualrent, though posterior to the adjudications and charges thereon, are preferable to the said adjudications.”

JUDGMENT.
Feb. 20, 1721.

1. In the case of *HENDERSON v. MACADAM*, June 16, 1612, it was found that an infeftment of annualrent granted by a debtor, after a denunciation in a comprising, was a good infeftment, in re-

spect the same depended upon a contract preceding the denunciation, by which the debtor was obliged to infeft the party in the annualrent.

2. The case of *JUSTICE v. AIK-*

ENHEAD, December 1682, reported by President Falconer, was a competition between an infestment expedite, after a charge upon a comprising, but proceeding upon a disposition granted prior to the apprising. It was PLEADED for the appriser, that, although the disposition was prior to the infestment upon the apprising, yet, seeing that there was a charge given to the superior upon the apprising prior to the infestment upon the disposition, and that as a charge against the superior was, in law, equivalent to an infestment, he ought to be preferred. The defender PLEADED, that although a charge against the superior upon a comprising was equivalent to an infestment among the adjudgers themselves, and did so bind up the

superior that he could do no deed to prefer one adjudger to another, yet it was not equivalent to an infestment in competition with a completed voluntary right, especially where the voluntary right was granted before the comprising. The Lords, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, albeit posterior to the charge upon the comprising, in regard they found—That the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights. The same point was raised in the case of *MUIR v. BALLANTYNE*, July 1728, when a similar judgment was pronounced.

An Adjudication not followed by Infestment, or at least by a charge to the superior, debito tempore, does not exclude an Infestment proceeding on a subsequent voluntary right.

I.—*WALLACE v. BARCLAY.*

Dec. 8, 1730

NARRATIVE.

IN December 1726, the pursuer, being a creditor of James Wilson of Easter Carse, led an adjudication against him, and in April 1727, he charged the superior to receive him. In 1730, James Wilson of Easter Carse granted to the defender an heritable bond, whereon he was infest in October of the same year, and entered into possession. In 1735, the pursuer brought a process of mails and duties against the possessors of the lands, in which the defender compeared for his interest.

PLEADED FOR THE PURSUER.—The heritable bond founded on by the defender was granted by the common debtor long after the adjudication led by the pursuer. A citation in an adjudication renders the subject litigious, so that any voluntary right granted thereafter by the common debtor, is null and void in a competition with the adjudger. The pursuer was not *in mora*, the heritable bond being granted within three years and a half of the date of his adjudication, and there is no instance known in practice where *mora* was found incurred in fewer than six years.

WALLACE
v.
BARCLAY.
1736.

ARGUMENT FOR
PURSUER.

But farther, the pursuer charged the superior in due time, after which *mora* can never be incurred. No law obliges an adjudger to take infeftment. An adjudication with a charge is a complete diligence *in suo genere*. It is true, it must yield to an infeftment upon a voluntary right, where the voluntary right was granted before the citation in the adjudication, yet it must be preferred upon the head of litigiosity to all voluntary rights granted after the citation; and this privilege of rendering the subject litigious will never fall, provided the superior be charged in due time.

The reason why there can be no *mora* upon the part of an adjudger after he has charged the superior, is, that had he been infeft, that would have rendered his diligence absolutely complete, and he cannot be *in mora* for not obtaining himself infeft after charging the superior for that purpose. *Mora* consists in neglecting to complete the diligence, for which there can be no room after the diligence is completed, which it is by infeftment, or a charge against the superior to give infeftment, an adjudication with a charge being reckoned an effectual diligence in law.

Whatever necessity there might be for infeftment or a charge as the law formerly stood, to save an adjudger from being *in mora*, according to the present practice, an adjudger cannot be reckoned *in mora* during the legal at least, though he neither proceeds to take infeftment, nor to charge the superior, nor to enter into possession. According to the present practice, an adjudication is reckoned a *pignus prætorium*, or right in security, the nature of which is, that the creditor may do diligence upon it or not, at his pleasure. Many adjudgers are unwilling to sub-

WALLACE
v.
BARCLAY.
1736.

ject themselves to a count and reckoning, the necessary consequence of entering into possession. They will have their money in a slump, or the land in place of their money, in case the legal may be allowed to expire. The original conception of comprisings was a legal disposition or sale of lands under reversion, whereby the appriser was not accountable for his intromissions. His delaying, therefore, to enter into possession would no doubt infer negligence or *mora*. But this can never be inferred now during the legal, for adjudgers are now liable to account for their intromissions, and as being creditors in security, have their option to do diligence or not as they see cause. There does not, therefore, appear any ground to impute *mora* during the currency of the legal, although the adjudger should neither charge the superior nor enter into possession.

The Act 1661, bringing in apprisers *pari passu* with the first effectual apprising, declares that the first effectual shall be understood either where infeftment has followed, or the first exact diligence for obtaining it has been used. This Act, however, passed when both the custom and law obliged apprisers to take infeftment, without which their diligence was not reckoned complete even during the legal. But according to the present practice, adjudgers are rather reckoned rigorous who take infeftment during the legal, and a charge against the superior can serve no other purpose but to obtain an infeftment. Were, therefore, the Act to be made now, it is probable that a simple adjudication would be declared an effectual diligence during the legal. But although the Statute has required infeftment, or a charge to constitute the first effectual apprising, that has no relation to the present question.

The pursuer's adjudication was deduced in December 1726. The charge against the superior was given in February 1727. The present action of mails and duties was raised in December 1735. Laying, therefore, the charge out of the question, the pursuer has commenced his diligence a considerable time within the expiry of the legal. This, it is apprehended, is sufficient to save him from the imputation of being *in mora*.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The defender being an onerous creditor, and infeft in the lands, is preferable to the pursuer,

whose debt remains personal to this day. A simple adjudication cannot disable the common debtor from granting an infeftment. An adjudication is no more than a judicial disposition, having only the effect of an assignation to maills and duties, without necessity of intimation. It cannot, therefore, compete with a right completed by infeftment, any more than a voluntary disposition can do so. The common debtor still remains in the fee. He may therefore alienate the same, or burden it in favour of purchasers or onerous creditors, and those attaining the first complete right must be preferred.

WALLACE
v.
BARCLAY.
1736.

It is true that by the summons of adjudication, the subject becomes litigious. But this consequence remains no longer than while the creditor is in the course of diligence for obtaining decree. If, therefore, he is either remiss in prosecuting his summons to a decree, or in obtaining infeftment thereon, the citation in the summons can signify nothing. The litigiosity of the subject is finished by the decree. It is no more a plea, and members of the College of Justice may purchase a decree of adjudication, and the lands thereby affected, although they are discharged from purchasing pleas or litigious subjects. A debtor, therefore, is not disabled by an adjudication from alienating or burdening, for onerous causes, an estate adjudged. The diligence by inhibition is a personal prohibition to the debtor to do any deeds in prejudice of the ground of it, and to the lieges to concur in such deeds. But a fiar, who is not disabled by inhibition from contracting, and who remains still in the absolute fee, may grant onerous deeds affecting it, which, being first perfected into real rights, are preferable.

A charge against the superior does not alter the case. An adjudger cannot gain a preference by means of that. All the effect which a charge against a superior has, is with respect to competitions among adjudgers. The adjudication is deemed in law perfected by a charge, in the same manner as if infeftment had followed, for the purpose only of giving a preference to such adjudger, and those within year and day of him, so as to exclude posterior adjudgers as effectually as if infeftment had really followed.

A voluntary right prior to an adjudication may be perfected by infeftment thereafter, although a charge against the superior

WALLACE
v.
BARCLAY.
1786.

had proceeded on the intervening adjudication, before infeftment had been obtained on the voluntary right. Although, too, a superior had been charged upon an adjudication, the widow of the debtor will be entitled to her terce, unless actual infeftment had followed on the adjudication during her husband's life.

A charge against superiors is latent, and to be found upon no record. It were ridiculous, therefore, to ascribe so great effect to it as to disable the debtor from granting onerous rights to *bona fide* contractors with him ; the true effect of a charge being only to perfect the adjudication in a question with other adjudgers.

The pursuer is also *in mora*. Along with the charge, he ought to have offered the superior a year's rent for the entry, and a charter to be signed by him. This alone could render the superior contumacious ; and in the construction of law between the vassal and him, a charge so qualified would be deemed equivalent to an infeftment. If the pursuer had proceeded in this manner, he might have pled that he was not in fault, since he had done all that was in his power to obtain infeftment. It is only a charge in the above terms that can exculpate the adjudger in a question with an onerous singular successor infeft. For in a question with the superior himself who is charged, the adjudger would require to subsume upon a charge so qualified, so as to save himself from the casualty falling by the debtor's death, or even by his deeds inferring recognition or other casualties. The pursuer, therefore, not having duly completed his diligence, the defender ought to be preferred to him as being an onerous creditor infeft.

JUDGMENT.
Dec. 8, 1786.

The Lords "Preferred the pursuer, on his interest produced, to the rents and duties of the lands and others libelled, of all years and terms bygone, and in time coming, aye and while he is paid of the sums in his said adjudication, and that to the heritable bond and infeftment produced for the defender."

II.—DUCHESS OF DOUGLAS v. SCOTT.

In February 1747, Henry Ogle obtained an adjudication against Lord Cranstoun, adjudging his whole estate, including the lands of Wauchope, which were held of the Duke of Douglas. Upon this adjudication, the Duke was charged in April of the same year.

July 26, 1764.

NARRATIVE.

In July 1747, the Duke of Douglas also obtained an adjudication against the same estate, which being within year and day of the first effectual adjudication at Ogle's instance, came in by force of the Statute 1661, *pari passu* with it. After obtaining his decree of adjudication, the Duke took no step to complete it, either by infeftment or charge, or to attain possession of the lands adjudged, by process of maills and duties, but suffered the common debtor to continue in possession as formerly, down to the year 1754. In that year, another creditor on the estate brought a process of ranking and sale.

In May 1750, being less than three years after the adjudication led by the Duke, Lord Cranstoun granted an heritable bond over the lands of Wauchope to Mr. Scott, upon which he was infeft.

The respective interests of the creditors being produced in the process of ranking, the question occurred, Whether the Duchess, as in right of the Duke of Douglas' adjudication, or Mr. Scott in right of his annualrent, were preferable?

PLEADED FOR THE DUCHESS.—The question at issue is, Whether the common debtor could do any deed in prejudice of the Duke's diligence within three years after it was led? By the Duke's adjudication in 1747, the subject was rendered litigious, so that it could not be affected by any voluntary deed of the common debtor in prejudice of the Duke's diligence. The diligence of a creditor proceeding to affect his debtor's subjects, cannot be disappointed by any voluntary deed of the debtor. Were it otherwise, every diligence of the law might be rendered elusory, and the subject carried off from the creditor by voluntary alienations, which are executed so much sooner than at-

ARGUMENT FOR
THE DUCHESS
OF DOUGLAS.

DUCHESS OF
DOUGLAS
v.
SCOTT.
1764.

tachment by process of law. A creditor who proceeds to affect his debtor's subjects by a process of adjudication, or by using an arrestment, cannot be hurt by any deed of the debtor ; and it required the force of a statute to limit the effect of the litigiosity occasioned by the diligence of arrestment to five years. Inhibition restrains the debtor upon the same principle ; and the only difference between it and the other diligences is, that in it the prohibition to alienate is expressed, while in the others it is only implied, which is perhaps the reason why the litigiosity created by it lasts longer. This principle received the sanction of the statute law by the Act 1621, cap. 18, which provides against bankrupts " making any voluntary payment or right to any person in defraud of the lawful and more timely diligence of another creditor having served inhibition, or used horning, arrestment, comprising, or other lawful means, duly to affect the divers lands." By the Act 1672, which introduced adjudications in place of apprisings, it is declared, " that the adjudgers shall be in the same situation after citation in this process of adjudication, as if apprisings were led of the lands at that time, and a charge given to the superior thereupon." By this Act, the litigiosity arising from the citation is made equal to that which was produced by the decree of apprising ; and, indeed, it is carried still farther, and made equivalent to the diligence completed by a charge against the superior.

There is a material difference between the litigiosity which is created by the decree of adjudication, and that which is produced by the citation only. The litigiosity created by the decree is to be seen upon the record of the abbreviates of adjudications, so that every man lending his money after an adjudication is passed, has fair warning to be upon his guard. In this respect, it differs not only from the litigiosity created by the citation, but also from that which is produced by arrestments and simple charges of horning, which are mentioned in the Act 1621. These are to be seen upon no record, and a decree of adjudication, therefore, may very fitly be compared to an inhibition, which must likewise be recorded. Purchasers or creditors lending their money make as regular a search of the Register of Adjudications as they do of that of Sasines or Inhibitions.

The litigiosity created by an adjudication does not continue only during the dependence of the process. In ordinary processes intended to constitute a debt, or declare a right to lay a foundation for diligence, litigiosity ends on pronouncing decree. After this, there is no longer a *lis pendens*. This, however, will not hold in a process of adjudication, for after the decree of adjudication is obtained, something is still wanting to make it a complete and effectual diligence, namely, infeftment, or a charge against the superior. Until one or other of these be done, the subject still continues litigious, and the creditor is only *in cursu diligentia*.

DUCHESS OF
DOUGLAS
v.
SCOTT.
1764.

It is not pretended that the effect of litigiosity, even upon record, will bar a purchaser or creditor who had contracted with the debtor, before the process of adjudication commenced, from completing his right by infeftment. It would be unreasonable that the intervening process of adjudication should hinder such contractor from using the right that was in him, *ab ante*, and executing his procuratory or precept, and so completing his right, without any act or deed of the debtor, which only the process of adjudication prevents. In such cases, the principle is preserved inviolate, that litigiosity bars all the voluntary deeds of the debtor, though it does not tie up the hands of third parties.

The decree of adjudication, therefore, makes the subject so litigious, that although the creditor proceeds no farther, yet the debtor cannot disappoint the effect of the decree, at least within a competent time, which is allowed to the adjudger to complete his right by charge or infeftment. The question then comes to be, What time the law has indulged the adjudger for that purpose, during which the litigiosity lasts, and the adjudger is still held to be *in cursu diligentia*? This is an arbitrary question, and no precise time has been fixed. It appears from the decisions, that the shortest prescription of the litigiosity which has hitherto been sustained, is that of six years, which was the case in the old decision, observed by Spottiswood in 1627, but the later decisions are of cases where the *mora* was ten, twelve, and seventeen years. It would be entirely without precedent to hold, that the benefit of an adjudication has been lost by a *mora* of less than three years. For the *mora* is only to

DUCHESS OF
 DOUGLAS
 v.
 SCOTT.
 1764.

be computed from the date of the adjudication, to the time when the voluntary right was granted. If the litigosity then continued, the right was null and void, and it cannot convalesce *tractu temporis*, or *ex post facto*, unless it could be maintained that the right of challenge was lost by prescription.

An adjudication may be considered in a two-fold light.—*First*, as a step of diligence or legal execution, which *per se* renders the subject litigious, and gives the creditor a security for recovering his payment during the legal. It may be considered, *Secondly*, as a judicial conveyance of heritage, which in the case of non-redemption, will vest in him an absolute right to the property in the subject. After the expiry of the legal, an adjudication differs very much from what it was during the currency of the legal. After the legal is run, it is to be considered as a judicial conveyance, not as a step of diligence rendering the subject litigious. In competition therefore with another conveyance, the first infeftment will give the preference. After the legal is expired, an adjudger is only to be considered as a disponee, having a personal right to the property in the lands. If he then delays infeftment, *sibi imputat*, and there is then just ground for preferring a posterior voluntary disponee obtaining the first infeftment. While, however, the legal is current, the law does not oblige creditors to take measures for obtaining a feudal title, because it is uncertain during the legal whether a right will ever be absolutely vested in them. Infeftment is indeed necessary to an adjudger to secure him against the effect of voluntary deeds, granted prior to his citation in the adjudication. Infeftment or a charge is also necessary to make an adjudication effectual in the sense of the Act 1661. But neither an infeftment nor a charge is necessary to secure the adjudger against voluntary deeds granted posterior to the citation in his adjudication. An adjudger, therefore, cannot be held to be *in mora* during the legal. For though it is reasonable that a debtor's hands should not be for ever tied up, yet so long as the adjudger can reap all the benefit of his diligence, when considered only as a diligence, and not in the light of a disposition, without taking a step so expensive as infeftment, he is not guilty of *mora*. The meaning of the word *mora*, is that of dereliction. The creditor is

understood to have derelinqushed his diligence, and to have renounced the security arising from the litigiousity thereby created. But it cannot be supposed that an adjudger has derelinqushed his diligence merely because he has not done more than adjudged during the legal. Still less can it be supposed that an adjudger has done so by delaying farther proceedings for only two years and ten months, more especially when he saw an adjudication, completed by a charge, a few months before he led his own adjudication, and consequently had reason to consider himself secure upon that ground.

The adjudication of the Duchess, being within year and day of the first adjudication, which was rendered effectual by a charge, is the same as if it had been the first effectual one. A charge is held to be exact diligence, without the necessity of entering into a process with the superior. An adjudger who has charged the superior is in a better condition than another who has not charged, even with respect to voluntary rights. If then the first adjudication on which a charge was given be preferable, so is that of the Duchess, as it is within year and day of it, and consequently entitled to the benefit of the Act 1661, which declares that all adjudications within year and day of the first effectual one, shall come in *pari passu*.

The plain meaning of the Statute is, that the first adjudger is to be considered as trustee for all the after adjudgers within year and day of him. Their adjudications are held *fictione juris* to be contained in his, so that they have no occasion to proceed farther, but may rely upon his diligence. This, accordingly, most adjudgers have done, seldom putting themselves to the trouble of another charge.

If the benefit of the first adjudger's charge be denied to the second adjudger, the benefit of the first adjudger's infetment must be denied also. The consequence of this would be ruinous to the debtor, as every adjudger would be laid under the necessity of infetting himself. To find, therefore, that the diligence of the first adjudger is not communicated to the second, would introduce a novelty troublesome to creditors and destructive to debtors.

DUCHESS OF
DOUGLAS
v.
SCOTT.
1764.

PLEADED FOR MR. SCOTT.—Feudal principles must govern ARGUMENT FOR
MR. SCOTT.

DUCHESS OF
DOUGLAS
v.
SCOTT.
1764.

every question respecting the original constitution, transmission, or extinction of heritable rights. *NULLA SASINA, NULLA TERRA.* It is the original investiture or infeftment that constitutes the first real right and vests the fee or property of lands. It is the renewal of that real right by investiture and infeftment in the person of the heir, or of the purchaser and creditor, that transfers that property. The one cannot be invested but in so far as the former proprietor is divested by the transmission or transfer of the real right. In competitions, therefore, among different parties claiming right to the same subject, the first complete feudal right gives the preferable title. A second disponee obtaining the first infeftment, is clearly preferable to the first disponee to the last infeft. The reason of this is, that the disponent was not divested of the fee by the first personal right, which being established in his person by infeftment, must be carried from him by the first real right. The same principle governs the competition between adjudgers who are disponees by the act of the law, except in so far as it is otherwise provided by statute, or between adjudgers and voluntary disponees.

The security of the records is deeply interested in the present question. Purchasers and creditors have been taught to rely upon these. If the person with whom they contract stands vested in the feudal property upon record, they have nothing to fear from any incomplete or personal right, and nothing can limit that right as against purchasers or creditors, except what appears upon the face of these records.

An adjudication, even with a charge against the superior, does not divest the former proprietor, and transmit the real right to the adjudger. It does not make the adjudger vassal. It does not afford a title to pursue a removing or other real action. It does not exclude the *terce* or *courtesy*, nor, *é contra*, does it entitle the wife or husband of the adjudger to a *terce* or *courtesy* of the lands adjudged. It does not require a special service, as every other real right does. In short, until it is completed by charter and infeftment, and the legal expired, it is but a personal incomplete right, a *pignus prætorium*, which neither establishes any real right in the adjudger, nor divests the former proprietor of the fee.

The plea of preference maintained by Mr. Scott rests upon

this solid foundation, that he purchased his right for a valuable consideration upon the faith of the public records, from one who stood vested in the absolute fee. By his infestment he has acquired the first complete real right, and is thereby preferable to every personal right prior or posterior.

DUCHESS OF
DOUGLAS
v.
SCOTT.
1764.

Where a creditor is *in cursu diligentiae*, the effect of his diligence is not to be frustrated by the partial voluntary act of the debtor. This principle is not disputed. As equity, however, is the governing principle which gives relief in such a case, the same equity limits the exception by this equitable rule, that if the creditor who has used the prior diligence stops short and does not proceed to complete the same, he forfeits the advantage which the law gave him in respect of his being *in cursu diligentiae*. The hands of the debtor cannot remain for ever bound up, nor the lieges kept under a perpetual restraint from contracting with him.

Adjudications are no other than redeemable dispositions by the act of the law. They fall to be completed by infestment, as much as any voluntary disposition. If, therefore, a creditor, after obtaining his decree of adjudication, stops short and proceeds no farther by compelling the superior to grant him charter and infestment, nor by charging him upon the adjudication, nor by process of mails and duties, but suffers the debtor still to continue in possession as formerly, he justly forfeits that security which the law gave him while, *in cursu diligentiae*, against the voluntary act of his debtor, in competition with onerous purchasers and creditors.

As to the charge given to the superior by the first adjudger, that charge operates only among adjudgers themselves. It has no effect in regard to an infestment on a voluntary right expedite after the first, but before the second adjudication. It has been found that the infestment of a first adjudger is not communicated to a posterior adjudger so as to defeat a voluntary intervening right. Much less can a mere charge to the superior have that effect.

The Lords found,—“That in this competition, Walter Scott, the annualrenter, is preferable, and prefer him accordingly.”

JUDGMENT.
July 26, 1764.

LORD AFFLECK observed,—“Suppose one raises an adjudication, and wakens it from time to time. No charge ever given

OPINIONS.
MS. Notes.
Sir Ilay
Campbell's
Session Papers.

DUCHESS OF
DOUGLAS
v.
SCOTT.
1764.

upon this adjudication. He must do the necessary *debito tempore*, either by getting infestment, or doing what he can to get infestment. Number of years of no consequence. The question is,—If the adjudger is *in cursu*? If he lets it lie over for three years without doing anything, he is *in mora*, and an infestment will be preferred.”

MS. Notes.
Sir Ilay Campbell's Session
Papers.

LORD COALSTON observed,—“Heritage and moveables are only transferred by delivery. Litigiosity has only effect when the creditor is *in cursu*. The *mora* is not ascertained. In Spottiswood's decision, seven years were sufficient. In Binning's case, six years. Here it is as long as the adjudger was *in mora*, till the process of sale was raised, so six years; and therefore I would prefer the annualrenter in the lands held of the Crown. Again, as to those held of the subject, I think Grieve should be preferred, as he charged the superior, and could do no more. But as to the Duchess, she only had the benefit against adjudgers, but not against annualrenters, although at first I thought she could. Now, however, seeing the point was once determined in the case Wallyford, I would prefer the annualrenter.”

LORD KAMES.—“This is a most important case. I would distinguish between a citation and a decree of adjudication as to litigiosity. The rule is, that the debtor's hands are tied up, not to defeat the diligence of creditors, but then this goes on the supposition that the creditor follows out his adjudication *sine mora*. Therefore, if a process once sleeps, the litigiosity flies off. But a decree of adjudication stands on a different ground from a process. The challenge it affords is litigiosity. I have formed my opinion on the decision in 1736, the ground of which was, that a creditor who does not infest during the legal cannot be said to be *in mora*. If he infests sooner, he would be rigorous and oppressive to the debtor. *Ergo*, no *mora* during the legal, but after it there may be *mora*. Otherwise, every adjudger will be obliged to infest even although he has a charge, and so cut the debtor out of the reversion by the expense. He who lends his money during the legal, lends only on the faith of the reversion.”

LORD COALSTON.—“I am aware of the consequences mentioned by Lord Kames, but these do not move me. A charge

will not secure an adjudger against infestment on prior rights, so he will still infest to be absolutely secure. Then, the practice of the Court has been very strong against holding no *mora* during the legal."

DOUGLASS, OF
DOUGLAS
v.
SCOTT.
1764.

1. "This also is singular in apprisings and adjudications, that a real right of fee is constituted thereby, by a charge of horning against the superior without charter or sasine; for such apprisings or adjudications are declared effectual by the Act of Parliament 1661, cap. 62, ordering the payment of debts betwixt creditor and debtor. For after that charge, no infestment upon voluntary disposition, or upon any other apprising or adjudication, can be granted by the superior preferring any other vassal to the appriser or adjudger, whom he hath unwarrantably refused to enter, if the appriser or adjudger insist in his apprising or adjudication for possession. But he may forbear to make use of the apprising, and if he lie long out without further diligence, he will be presumed to have relinquished his apprising or adjudication, and posterior rights will be preferred; but if he enter into possession, no posterior infestment or diligence will exclude him, although he insist no farther but the charge of horning. And it hath not occurred to be determined, how long that right will subsist without infestment."—*Stair*, 2, 3, 30.

2. "The third effect of apprising is, that being a legal diligence,

it renders the thing appraised litigious, not only from the date of the apprising, but from the date of the denunciation; so that no voluntary deed of the debtor after the denunciation, can prejudice the appriser, if he be not *in mora*. It is said no voluntary disposition or deed of the debtor, after the denunciation, will prejudice the apprising, because if the deed done thereafter be necessary, and that thereunto the debtor was specially obliged before, and might have been directly compelled, such even after denunciation may be preferred. And generally voluntary rights are excluded, being granted after the denunciation of lands to be appraised, though before infestment be obtained, or a charge against the superior; all which is the creditor being *in cursu diligentiae*, but if he be supinely negligent, he will lose that privilege. After a competent time for obtaining infestment, or charging the superior upon the decret of apprising, any posterior voluntary right is preferable to the apprising."—*Stair*, 3, 2, 21.

3. "Any voluntary infestment being granted *in cursu diligentiae* of a creditor, that creditor's right is preferable, and in competition will be preferred, though it be not

completed. But *cursus diligentie* is taken away, if negligence intervene, which must not be reckoned by what diligence possibly might be done, but by such diligence as prudent men would have done in such circumstances. By diligence in this case is not understood a personal action, which could not be known, but a real diligence for effecting the subjects in question, and not the person of the debtor only; whereof the law hath determined several cases, as diligence by apprising runs from the denunciation of the lands to be appraised; and diligence by adjudication now come in place of apprising runs from the citation upon the summons of adjudication, which must so hold in adjudication upon the renunciation of heirs, or for completing of dispositions. But so soon as decreets of apprising or adjudication are obtained, and such time as a charge might be given to the superior, that diligence is then complete, and the infeftments are preferable according to these sasines or charges."—*Stair*, 4, 35, 17.

4. "Albeit the Act of Parliament, 1661, c. 62, mentions diligence upon the charge against the superior, yet custom hath required no more but the charge; it being incongruous for an adjudger, who designs to be a vassal, to use caption against his superior, and therefore the adjudication with the charge, hath during the legal all the effects as if infeftment were expedite. For during the legal, the adjudication is but *pignus prætorium*, not denuding the su-

perior. And the superior cannot compel the adjudger to take infeftment, so that during the legal he is free of a year's rent, which he behoved to pay while infeftments were necessary."—*Stair*, 4, 35, 25.

5. Arrestments and adjudications are on the same footing in respect of *mora* on the part of the creditor. The former is merely an inchoate diligence. In order to complete it, it requires to be followed up by a decree of forthcoming. The completion of an adjudication consists in obtaining infeftment upon it. With regard to arrestments, Lord Stair observes,—“That which transferreth the right, is neither the arrestment, the citation, nor any thing in the process, but only the decreets for making forthcoming, which is in the same condition as to subjects arrestable as apprisings and adjudications are to others. Seeing the arrestment maketh the subject arrested litigious, it hath the common effect necessarily introduced by law, *in re litigiosa*, that inchoate diligence cannot be excluded either by the voluntary deed of the debtor, or by any legal diligence posterior, unless the user of the first inchoate diligence became negligent; *nam vigilantibus non dormientibus jura subveniunt*.”—*Stair*, 3, 1, 42. In another passage he observes,—“The arrestment doth not give the arrester right, but process thereupon excludes posterior voluntary rights by disposition or assignation, as being in *cursu diligentie* of the arrester. Yet if he be supinely

negligent, the voluntary right will be preferable, if perfected by intimation of the assignation, and by possession on the disposition."—*Stair*, 4, 35, 6.

6. Spottiswood, in his *Practicks*, reports the case of *HAMILTON v. M'CULLOCH*, July 21, 1627. Hamilton having comprised certain lands from a party after his apprising, and long before he took sasine, the common debtor sold a part of the same lands to M'Culloch, who was infeft therein. Hamilton brought a reduction of the disposition and infeftment, in respect it was made after the comprising by which the disponent was denuded of all the right and title he had, that he could not afterwards make disposition thereof in prejudice of the compriser. The pursuer PLEADED,—That the denunciation of the lands to be comprised was a public deed, which, with the comprising following thereon, not only denuded the disponent of all right he had, but also put all others *in mala fide* to take any disposition from him of these lands, otherwise there would be no difference between a comprising which is real, and a contract of alienation. It was PLEADED for the defender,—That the reason of reduction was not relevant, because nothing had followed upon the pursuer's comprising for the space of *six* years, which might have put the defender *in mala fide* to buy the same lands from the disponent, as the pursuer had neither executed inhibition, nor taken sasine upon his comprising. The Lords, in

respect of the long time that intervened between the comprising and sasine following thereon, during which he had done no diligence to get himself infeft upon his own comprising, found the reason of reduction not relevant. Spottiswood adds,—“But if the compriser had been infeft soon after his comprising, or yet had charged the superior, or done other diligence to get himself infeft, the reason would have been thought most relevant to reduce on.”—*Spottiswood, Comprising*, p. 43.

7. In *JOHNSTON v. JOHNSTON*, July 23, 1674, reported by Lord Stair, the pursuer, who had obtained a public infeftment upon his adjudication three months subsequent to a base infeftment obtained by the defender, objected to the defender's infeftment on the ground that it had been obtained subsequent to his apprising, and PLEADED,—*In re litigiosa*, no new right granted by the common author can be preferred to the anterior diligence of a creditor. And so it has always been found, that after denunciation of lands to be appraised, they become litigious, and no infeftment upon a voluntary disposition, though prior to the infeftment on the apprising, is preferable thereto, otherwise creditors' diligences might be altogether disappointed, and others preferred. The Lords found that the apprising did not make the subject litigious after denunciation, unless the appriser had proceeded in exact diligence to obtain infeftment, or to charge the superior; but having delayed for a long

time, they found the base infeftment clad with natural possession preferable to the public infeftment.—*Stair's Decisions*, vol. ii. p. 280.

8. In *NISBET v. HAMILTON*, February 9, 1676, a debtor, after his lands had been denounced to be comprised, granted a voluntary right of annualrent out of the same lands for an onerous cause. The annualrenter was infeft by a public infeftment, before any infeftment upon the comprising. A competition then arose between the compriser and the annualrenter. The compriser PLEADED,—That after the lands were denounced, the debtor could not give a voluntary right, as the subject had become litigious in consequence of the denunciation. The annualrenter PLEADED,—That as the debtor was not inhibited, he might give a voluntary right for an onerous cause, and that the first completed right ought to be preferred. The Lords, “in respect it was pretended that there were contrary decisions, declined to give answer until these should be considered.”

9. In *NELSON v. ROSS*, February 8, 1681, the defender PLEADED,—That, although when any lawful creditor is *in cursu diligentia*, no voluntary disposition by his debtor could exclude him, this could not apply in the present case, where the appriser was silent and negligent for the space of ten years, without infeftment or giving a charge, and without pursuing for maills and duties, and so could not be said to be *in cursu diligentia*. This case is thus reported by Lord Fountain-

hall:—“The Lords preferred a singular successor, who *bona fide* bought lands, to a comprising whose legal was expired before the said disposition, because the appriser was *in mora*, and had never done any diligence to infeft himself, or to charge and denounce the superior, whereas the receiver of the disposition was publicly infeft, though after the expiry of the legal. This would also hold in one who apprises after the other's legal who was not infeft, and the said last appriser infefts himself. The words of the interlocutor are:—‘The Lords, on Newton's report, find, that the appriser not having insisted in diligence, nor being *in cursu diligentia*, has thereupon no ground to reduce a posterior voluntary right granted for onerous causes.’ Stair tells us, ‘no voluntary deed can be done after the denunciation of an apprising; *intellige*, unless the appriser be *in mora*.’”—*Fountainhall*, 1, 129.

10. “Adjudication combines the two characters of an action and of a diligence; an action to be completed by decree; a diligence to be completed after decree by charter and sasine, or a charge against the superior. An adjudication does not, like a common action, lose the character of litigious by decree. It still continues to run its course as a diligence, till recorded and completed into a real right. If not recorded within sixty days, it loses all effect. If so recorded, the public have a fair intimation of the *nexus* formed upon the property. But still there are two questions here of some nicety. *First*, In a

competition between an adjudger, whose right is completed merely by a charge against the superior, and an infestment upon a voluntary conveyance granted before the adjudger's proceedings have been commenced, the infestment prevails. But where adjudication has been commenced before a voluntary conveyance is granted, is a charge to the superior sufficient to preserve the litigious prohibition in force during the legal? or, must the adjudger proceed to obtain infestment? It would appear that the charge is sufficient to preserve to the adjudger the benefit of litigiosity till the expiration of the legal; the adjudger not being bound to obtain infestment during the legal, nor blameable for neglect if he rest contented with the charge against the superior.

11. "But suppose that the adjudger has not himself charged the superior, and has no other completion of his diligence than, in virtue of the Statute, a communication of the benefit of another adjudger's charge, as being within year and day,—will this produce the effect? It would rather appear that it should not, as the Statute was meant to have effect among adjudgers merely, but not to extend to other creditors. In the case of the *DUCHESS OF DOUGLAS v. SCOTT*, the first adjudger had charged the superior, and raised mails and duties. The adjudication on which the Duchess claimed was within year and day, and the competition was between it and an heritable bond with infestment, dated three years after.

There were two questions:—1. Whether this was an improper delay? 2. Whether the charge upon the first effectual was not enough for the second adjudger during the legal? The case was fully argued in presence, and the argument is well stated in the report of the case in the Faculty Collection; but unfortunately we have no very clear indication of the ground upon which the Court proceeded in preferring the heritable bond. The case is also reported by Lord Kames, but it does not clearly appear even from his report upon what ground the Court proceeded. The decision seems, however, by the slight indications that remain, to have proceeded on these grounds:—1. That it is necessary for the adjudger at least to charge the superior. 2. That a charge upon a former adjudication, though within year and day, is not enough to supply the deficiency. 3. That a delay for three years to complete the adjudication destroyed the litigious quality of the adjudication. Lord Kames disapproves much of this decision, and in some remarks which he subjoins to it, insists that a charge should be sufficient during the legal, and that a second adjudger within year and day should be held as having charged. But to this may be opposed what Lord Kilkerran says in the case of *Binning's Representatives v. The Creditors of Auchinbreck*."—*Bell, Com.*, 2, 153.

12. Lord Elchies, in his Annotations, observes,—“Our author farther says, that an apprising, even with a charge against the superior,

will not exclude the *terce*; for, says he, it will not exclude the superior's casualties. He may be right, indeed, in his opinion about the *terce*; but he is certainly wrong in the reason he gives for it. For, wherever an infestment of apprising would exclude the superior's casualties, I cannot doubt the charge, regularly given, would have the same effect; because that would constitute the superior *in mora*, by which no man can benefit himself. But as to the principal question itself,—If the husband be denuded of the property by the apprising and charge, and if that constitutes a real right in the appriser, then, doubtless, it will likewise exclude the *terce*, which, by law, is always excluded or affected with all *onera realia* constitute by the husband *sine fraude*, as appears by the next Sect. 18, and has often been found in the case of annualrents, particularly in the case decided 1720 or 1721, Relict of Scott of Gilesby against Fordyce; and, therefore, if it is true, what our author advances elsewhere, lib. ii. tit. 2, sect 30, that this charge, without charter or seisin, constitutes a real right of fee since the Act 1661, and that, for that reason, it is a sufficient title for removing; the consequence should likewise be, that it would exclude the *terce*; for thereby the charge is, at least during the legal, equiptate to a charter of apprising and infestment upon it; which, without question, would exclude the *terce*. Yet I cannot but agree that this charge does not exclude the *terce*, and

that because I humbly differ so far from our author, that I think this charge constitutes no real right of fee.

13. "That it did not before the Act 1661, is plain by the decisions mentioned by our author; and I see no alteration in this particular made by that law; for it does not ordain an apprising and charge to constitute any real right; but only declares what apprisings shall, in a competition of several apprisings, be deemed the first effectual one, viz., that comprising that is preferable to all others, according to the law then being,—'In respect of the first real right, and infestment following thereon, or the first exact diligence for obtaining the same,' where it is plain, real right and infestment are used as synonymous words; and amounts to the same as if the clause had been, that the first effectual comprising should be such as was preferable to all others, in respect of the first real right following thereon, or the first exact diligence for obtaining the same. And it were ridiculous to imagine that the Parliament thereby meant that a real right, and diligence for obtaining a real right, was or should be one and the same thing;—and that they thereby intended so far to alter our language, and the meaning and signification of our words, that, by real right, we should in all cases understand diligence for obtaining real rights. For unless a charge upon an apprising be, in propriety of speech, a real right, it will not exclude the *terce*; and it is not sufficient that, in one particu-

lar case, the Statute makes it to have the like effect, that is, in competition with other apprisings, as if it were a real right; because that obtains only *vi statuti*, and cannot extend to other cases which the Act left in the same state, and to be determined by the same grounds of preference as formerly; *vide* 9th February 1669, Black against French. And it is observable, our author restricts this privilege of charges upon apprisings to the legal, well foreseeing the many absurdities that would follow by making it to subsist longer. But that distinction has no foundation in the Act; for the rule of preference thereby established amongst apprisers, lasts after the legal as well as during it; and, therefore, if that clause makes a charge against a superior a real right, it must be so likewise after expiration of the legal; and if that charge does not constitute a real right, then neither should it exclude the terce of the debtor's relict.

14. "But that the charge does not constitute a real right, farther appears from the decision, 26th February 1724, Mr. William Stirling and others against the Annual-renters upon the estate of Ballagan. The case whereof was, that the heritor of Ballagan, having contracted sundry debts, some whereof were constitute by heritable bonds, his personal creditors adjudged and charged the superiors before any infeftment on the heritable bonds, though the bonds themselves were prior to any of those creditors' diligences; and, after the adjudications and charge

against the superiors, but before any infeftment followed upon the adjudications, the real creditors were infeft; and, therefore, in the ranking of the creditors, it was alleged for the adjudgers, That their adjudications and charge had, in law, the effects of a real right, at least during the legal; and it was reasonable they should have that effect, the charge against the superiors being the last step of diligence the law requires during the legal, otherwise every adjudger must, even during the legal, take infeftment. Answered for the annual-renters,—That the Act 1661 did not regulate the preference of adjudications in competitions with one another, not in competition with other voluntary rights; and the decision was cited 10th March 1683, Falconer,—Decision 58; but that adjudication and charge made no real right, and therefore required no special service. The Lords found, That the heritable bonds, being prior to the adjudications, the infeftments thereon, though posterior to the adjudication and charge against the superior, were preferable to said adjudications."—*Elchies' Annotations*, p. 229.

15. The Proposition under which the case of *THE DUCHESS OF DOUGLAS v. SCOTT* is classed, is so framed as not to exceed what is warranted by the judgment pronounced in that case. It may, however, be doubted whether a charge by an adjudger should have any effect except in a question with a co-adjudger. Lord Elchies, in the passage just quoted, does

not refer expressly to the case of an infeftment taken after a charge by an adjudger, and proceeding on a voluntary right granted after the date of the adjudication. The view, however, taken by Lord Elchies, would seem to go the length of preferring the voluntary infeftment in that case, to the adjudication with a charge. This view is more consonant to the principle which ought to be rigidly adhered to in the transmission of land, that nothing but a registered sasine can

divest the proprietor. At all events, since the passing of the recent statute, 10 & 11 Vict., cap. 48, there is no ground for showing any indulgence to an adjudger, either on the plea of litigiousity, or on the plea that during the legal an infeftment is not necessary, and that a charge is sufficient. For by that Statute an adjudger, in obtaining a decree of adjudication, may also obtain warrant from the Court for infefting him in the lands adjudged.

The Infeftment of a prior Adjudger is not communicated to a posterior Adjudger, although within year and day, so as to prejudice an intervening Infeftment on a voluntary right, and in ranking with the posterior Adjudger, the prior Adjudger is entitled to receive the same sum as that for which he would have ranked if the intervening Infeftment had not existed.

1.—BINNING v. AUCHINBRECK.

Dec. 5, 1747.

NARRATIVE.

In January 1694, Sir William Sharp adjudged the lands of Richard Earl of Lauderdale, as charged to enter heir in special to John Duke of Lauderdale, his uncle, and to Charles Earl of Lauderdale, his father. Upon this adjudication, he expedite a charter under the Great Seal, and was infeft in 1695.

In 1694, the estates were again adjudged by Sir William Binning of Wallyford, but no charge or infeftment followed upon his adjudication. Earl Richard died in apperency, and the right of succession devolved upon his brother, Sir John Maitland of Hatton, afterwards Earl of Lauderdale, who made up titles by special service, as heir *cum beneficio inventarii*, and was infeft.

In 1696, Sir William Binning commenced a process of mails and duties upon his adjudication, but nothing was done in it ; and the Earl of Lauderdale continued to possess the estate.

In 1706, the Earl of Lauderdale granted an heritable bond to Sir Robert Blackwood of Pitreavie, on which he was infest. BINNING
v.
AUCHINBRECK.
1747.

In 1713, the Earl sold a portion of the lands to the pursuer, Sir James Campbell of Auchinbreck, who also acquired right to this heritable bond granted to Sir Robert Blackwood.

A ranking and sale having been brought of Sir James Campbell's estate, the representatives of Sir William Binning claimed to be preferred on the barony of Glassey, in virtue of the adjudication led by Sir William in 1694. The creditors of Sir James Campbell claimed to be preferred to Sir William's representatives, in respect of the heritable bond granted to Sir Robert Blackwood in 1706, and upon which he was infest, and to which Sir James Campbell had acquired right.

PLEADED FOR BINNING'S REPRESENTATIVES.—Sir William Sharp's adjudication was led in 1694, and completed by charter and sasine in 1695. Sir William Binning's adjudication was also led in 1694, and so was within year and day of the first effectual adjudication. The heritable bond granted by Sir Robert Blackwood cannot therefore compete with Sir William Binning's adjudication. The question raised is,—Whether an adjudication, within year and day of another adjudication completed by infestment, can be reckoned a complete right? If Sir William Binning's adjudication was complete, as being within year and day of the first effectual adjudication, there is no room for objecting the not prosecuting of his right, or to complain of *mora* on his part. For after his right was complete, there can be no *mora*. And, therefore, if a charge against a superior followed upon an adjudication, as that constituted an effectual adjudication, there can be no *mora* afterwards objected. ARGUMENT FOR
BINNING'S RE-
PRESENTATIVES.

Where the rights are not complete, and lie over for a considerable time, voluntary rights on which infestment has followed are preferred, because of the *mora* in not completing the diligence within a proper time. But Sir William's adjudication was complete *suo genere*. He was liable to pay for the expenses of Sir William Sharp's charter and infestment, and being within the year, must be held as comprehended in it. He had therefore no occasion to expedite a new infestment for himself. Although he should neglect the prosecution of his right ever so

BINNING
v.
AUCHINBRECK.
1747.

long, he would not lose his right, unless the forty years' prescription could be pleaded against him. It is, therefore, to no purpose to object those cases where it has been found that voluntary rights and infeftments are preferable, although granted *in cursu diligentiae* of another creditor, where that diligence was not followed out. For here Sir William's adjudication was complete, and there was no *mora*.

ARGUMENT FOR
CAMPBELL'S
CREDITORS.

PLEADED FOR THE CREDITORS OF AUCHINBRECK.—The plea of Sir William Binning's representatives is, that his ancestor's adjudication having been led within year and day of Sir William Sharp's adjudication, and Sir William Sharp having been infeft, his infeftment was available to Sir William Binning in the same manner as if that infeftment had proceeded upon his own adjudication, in terms of the Act of Parliament 1661. But the Act 1661, concerns only the preference of adjudgers *inter se*. It signifies nothing in competitions with infeftments upon voluntary rights. If a first adjudication be completed by infeftment, and a purchaser be infeft thereafter, but a process of adjudication was raised by a second adjudger, who obtained his decree within year and day of the first adjudication, the purchaser will be preferred to the second adjudger. In a competition with other adjudgers, Sir William Binning would be held to be infeft in consequence of the infeftment expedite by the first adjudger, Sir William Sharp, but in a question with a voluntary right it is different, as the Act 1661 does not affect voluntary rights.

In the case of WALLACE v. BARCLAY, an adjudication led in 1721, followed by a charge against the superior, was preferred to a voluntary right by infeftment upon an heritable bond, granted in 1730. The reason of this was, that the competition for maills and duties happened in 1735, during the currency of the legal. Within the legal it is not necessary for an adjudger to expedite an infeftment, and the adjudger in that case was insisting for the maills and duties within eight years of leading his adjudication.

Interlocutor of
Lord Ordinary.

LORD KILKERRAN, Ordinary, " Found Sir Robert Blackwood's heritable bond and infeftment preferable to Binning of Wallyford's adjudication, whereon no diligence followed from its date

in 1694, before Sir Robert Blackwood's infeftment in 1706, and that notwithstanding Sir William Sharp, the first adjudger, may have been infeft on his adjudication before the date of Sir Robert Blackwood's heritable bond and infeftment."

BINNING
v.
AUCHINBRECK.
1747.

On a representation and answers having been given in, Lord Kilkerran reported the case to the Court. The Lords found,—
"That notwithstanding of Wallyford's adjudication being within year and day of Sir William Sharp's, and his having raised a process of maills and duties in 1696, yet as he suffered the same to lie over from 1699 to 1706, the date of Sir Robert Blackwood's infeftment, and for several years thereafter, the said adjudication cannot compete with Sir Robert Blackwood's infeftment, nor could interpel the proprietor from granting a voluntary infeftment on his estate, and remit to the Lord Ordinary to proceed accordingly."

JUDGMENT.
Dec. 5, 1749.

LORD KILKERRAN observes in his Decisions,—“It is an established point, that the Act 1661 concerns only the preference of appraisers and adjudgers among themselves, but statutes nothing with respect to the competition between adjudgers and voluntary rights. That although it is true, that even an executed summons of adjudication prior to a voluntary sale, and on which decree of adjudication follows, though after the voluntary sale, and much more a decree of adjudication prior to the voluntary sale may be preferable, that is not upon the Act 1661, but on the head of litigiousity, which flies off, where the adjudger has been *in mora* of following forth his adjudication.

Kilkerran's
Decisions, p.
840.

“How long time is necessary to have that effect, has never been fixed; only cases have been determined as they have occurred. And the shortest time that has been sustained to infer such *mora*, is six years, in that case observed by Spottiswood, *Hamilton v. M'Culloch*, *voce* comprising. And here though Wallyford had pursued a maills and duties in 1699, yet it then slept, not only till 1706, when Sir Robert Blackwood's heritable bond was granted, but has never to this hour been wakened, the adjudication not having been heard of till it was produced in this process.”

On the Session Papers in this case, LORD KILKERRAN also writes,—“An adjudger is not to rely upon the infeftment of a

MS. Notes.
Kilkerran's
Session Papers.

BINNING
v.
AUCHINBRECK.
1747.

Brown's Sup-
plement, vol.
v. p. 778.

prior adjudger, as the Act 1661 concerns only the competition between adjudgers themselves. But he ought to take an infeftment of his own, or at least charge the superior, after which, indeed, the charger cannot be *in mora*."

LORD MONBODDO also observes,—“ In the year 1694, a second adjudication was led, within year and day of the first completed by infeftment. In the year 1696, a process of mailis and duties upon this second adjudication was commenced, and kept alive till the year 1699, when, upon an objection by the debtor to the grounds of debt, it was allowed to drop. Thereafter, in the year 1706, an heritable bond was granted by the debtor, whereupon infeftment was taken. In a competition betwixt this voluntary right and the second adjudication, the Lords unanimously preferred the voluntary right, and found that the adjudger here was *in mora*, and so could not compete with the heritable bond, though within year and day of an adjudication completed by infeftment, which the Lords found only gave him a preference among adjudgers, not in competition with voluntary rights, though the Lord President declared he wished the practice had been otherwise, and that a second adjudger could be considered in every respect as if his debt were contained in the first adjudication. As for the doctrine of *mora* in this case, see Dict. tit. Litigious, by which it would appear that this point is not quite settled yet.

“ The Lord President objected, that unless the two adjudications were considered as led for the same debt, the ranking of these three creditors would be inextricable ; for the first adjudger would be preferred to the annualrenter, he again to the second adjudger, and yet this second adjudger would come in *pari passu* with the first, and so be preferred to the annualrenter ; which makes an inextricable circle. But the solution of this difficulty, as the practice now is established in rankings, is as follows :—Suppose, as Lord Stair does, that the subject is six, and each of the debts four ; the first adjudger is ranked first, and takes four ; then the annualrenter, to whom there remains two ; but says the second adjudger to the first, As it is not reasonable you should lose by this annualrent that is preferable to me, so neither ought you to profit by it ; if it had not existed you would have drawn but three, therefore let me have

the one that you have above that number, so you neither profit nor lose by the annual renter, nor he by me, because he draws as much as he would have done if I had been out of the case. By this way of reasoning, the division is into three, two, and one. This the Lords not understanding, did once, in a similar case, bring all the three creditors in *pari passu*."

BINNING
v.
AUCHINCLOSS.
1747.

II.—CHALMERS v. CUNNINGHAM.

In 1677, the father of the pursuer granted an heritable bond of 1000 merks to Schaw of Nethergremont. Infestment followed upon this bond in 1694. Nov. 8, 1787.
NARRATIVE.

In 1692, Sir James M'Lurg adjudged the lands, and infestment followed upon the adjudication in 1693. The date of the decree of adjudication was December 21, 1692, and the date of the infestment following upon it was December 28, 1693. Other creditors adjudged within year and day of M'Lurg's adjudication, and in the ranking claimed to be preferred.

PLEADED FOR THE PURSUER.—The infestment upon the adjudication 1693, is not communicable to the other adjudications so as to prefer them to an infestment taken after their dates, upon a voluntary right granted prior to them. These posterior adjudications are in themselves but personal rights. The proviso in the Statute 1661, bringing in all adjudications before or within year and day of the first effectual one, is only to regulate preferences among adjudgers, but does not in the least alter the case with respect to infestments upon voluntary rights. In a question between adjudications and voluntary rights, the case must be decided as if no privilege had been granted to the other adjudgers of coming in *pari passu* with the first effectual one. The first infestment must be preferred, in accordance with the Statute 1695. A party taking a voluntary right is not bound to inquire whether there are other adjudications within year and day of the first effectual one. He looks at the Record of Sasines, and finding only one infestment upon an adjudica- ARGUMENT FOR
PURSUER.

CHALMERS
v.
CUNNINGHAM.
1787.

tion, he is entitled to consider himself safe against other adjudications which remain still personal, in the same manner as if no infeftment had followed on the first.

Infeftment taken upon an adjudication cannot make all adjudications that are *pari passu* with it equally preferable, as if infeftment had been taken upon them. A party who takes a disposition or an heritable bond prior to an adjudication being led, can only be barred by that on which infeftment has followed.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The infeftment in favour of Nethergrement is posterior to the infeftment on the adjudication obtained by Sir James M'Lurg, and is also posterior to the adjudications obtained within year and day of Sir James' adjudication. That infeftment ought, therefore, to be postponed to Sir James' adjudication, and to the adjudications within year and day of his. Where one adjudger has done such complete diligence upon his adjudication as to prefer himself to a posterior infeftment, though proceeding on a warrant prior to his adjudication, the infeftment of that adjudger is communicated to all other adjudgers within year and day against the posterior voluntary infeftment.

The words of the Act 1661 are clear, That such comprisings shall come in as if one comprising had been deduced for the whole. There is a Record of comprisings as well as of infeftments. It is admitted that a party is not bound to look at the Record of Adjudications, unless he is directed to it by the Record of Sasines. But a party contracting upon the faith of the records, must not shut his eyes in the middle of his search. If no infeftment upon an adjudication appears in the Record of Adjudications, then he is warranted to stop and rest secure. But if an infeftment on an adjudication appears on the Record of Sasines, he is *in male fide* to stop. The Act 1661 gives the benefit of that adjudication, and consequently the benefit of its infeftment to all adjudications, both prior and posterior, if within year and day. If, therefore, a party would be safe, he must search the Record of Adjudications.

It is admitted, that if an adjudication is led within year and day of the first adjudication, but posterior to an infeftment on

a voluntary right intervening between it and the first adjudication, the effect of the Statute must be stopped. In such a case the posterior adjudger will come in *pari passu* with the prior adjudger, but that *pari passu* preference will avail nothing to the prejudice of the party infert on the intervening voluntary right. His infertment will be a *medium impedimentum* to hinder the operation of the adjudication *retro* in competition with him. This, however, affords no argument for holding that an infertment on a voluntary right is preferable to an adjudication obtained prior to that infertment, and within year and day of an adjudication preferable to him by the infertment following upon it.

CHALMERS
v.
CUNNINGHAM.
1787.

The Lords found,—“ That Nethergremon't's infertment was preferable to all adjudications, whether prior or posterior to it, on which no infertment followed, notwithstanding they were within year and day of the first effectual adjudication.”

JUDGMENT.
Nov. 8, 1787.

LORD ELCHIES, in his Notes, observes,—“ In this process a very general question and of great importance occurred. The case was,—There was an adjudication and infertment upon it, and then there were many adjudications within year and day, whereon no infertment followed, and then an infertment of annualrent, and thereafter some more adjudications, which I think were also within year and day with the first. The question was,—How the annualrent was to be preferred in competition with both prior and posterior adjudications, whereon there was no infertment? There was no question that the adjudication with the infertment on it before the infertment of annualrent was preferable, but the question was as to adjudications within year and day of the first effectual one, and which are preferable *pari passu* with it, whether they are also preferable to the infertment of annualrent, whether they led before or after it, or *é contra*? The Lords found,—That Nethergremon't's infertment of annualrent is preferable to all adjudications, whether prior or posterior, on which no infertment followed, notwithstanding that they were within year and day of the first effectual adjudication on which infertment followed prior to the said annualrent—and, therefore, adhered to the Lord Ordinary's interlocutor, finding that Nethergremon't's debt ought to be stated *in computo*.”

Elchies' Decisions, vol. ii.
p. 5.

1. In the case of *BROWN v. NICHOLAS*, February 6, 1673, reported by Lord Stair, a competition took place between an annual-renter who had been infeft after the first adjudication, but before several other adjudications which were led within year and day of the first. The annual-renter claimed to be preferred to all the adjudgers except the first, in respect that his annual-rent had been constituted by infeftment before the date of their adjudications, and that the Statute 1661 could not apply where there was a mid impediment, such as that caused by the annual-rent. The posterior adjudgers **PLEADED**,—That their adjudications being led within year and day of the first effectual adjudication, were *fictione juris* drawn back to the date of that adjudication, as if they had been comprehended in it, or led on the same day with it, in which case all of them would have been anterior, and therefore preferable to the annual-rent. The Lords found,—“That the intervening annual-rent could not hinder the posterior appraisings to come in with the first, but that the annual-rent should bring in the sum whereupon it was granted, as if an apprising had been led thereupon.” Lord Stair adds,—“The statute being new and dubious.”

2. The case of *BROWN v. NICHOLAS* is the one referred to by Lord Monboddo, in his Observations on the case of *BINNING v. AUCHINBRECK*. Lord Stair disapproved of the judgment in the former case, and thought that the

annual-rent ought to have been excluded. He observes,—“It is certain that the Statute leaves annual-renters as they were before, and so that they can never come in *pari passu* with adjudications, unless the date of the first effectual adjudication and annual-rent were the same, and therefore there is much more reason that the annual-rent, which was constituted *in cursu diligentie* of the first effectual adjudication should be postponed to all the adjudications. Because the first effectual adjudication is, as if all the prior and posterior adjudications within the year were contained in it, and so the diligence for obtaining of that adjudication is for them all.”—*Stair*, 4, 35, 30. Neither the judgment of the Court in the case of *BROWN v. NICHOLAS*, nor the view taken by Lord Stair, has been followed. The rights of parties in the several adjudications and voluntary infeftments have been settled on a more equitable principle, according to which the intervening infeftment on the voluntary right excludes the posterior adjudger; but at the same time, the prior adjudger is not injured by that infeftment, but is entitled to rank as if that infeftment had not intervened.

3. LORD PITFOUR in his MS. Note-Book, the property of Mr. George Dundas, Advocate, likewise reports the case of *CHALMERS v. CUNNINGHAM*. The question raised is thus stated :—“After infeftment taken upon a first adjudication, other creditors adjudged within the year, without infefting,

Adjudication with infestment, without year and day. 3. Infestment of annual rent upon an heritable bond dated prior to both adjudications. Here the adjudger with the charge is the man who has the personal challenge. The other two are ranked by their infestments in the first ranking. Thus: 3 debts. Each 4. Fund 6."

"Fund 7. { Adjudger-infert draws 4 } Charge draws back 8. { Thus, Adjudger-infert
Annualrenter . . . 8 } draws 1; each of the
other two, 3."

the first adjudger in not taking infestment on his adjudication that the annual renter was not excluded by both adjudications, the loss arising from that omission ought to have fallen upon the first adjudger exclusively, the adjudger-infest being entitled to draw the same sum as he would have drawn if the first adjudger had been infest. The scheme of Lord Elchies, therefore, ought to be rectified as follows :—

Fund 7. $\left\{ \begin{array}{l} \text{Adjudger-infert draws } 4 \\ \text{Annualrenter } \quad \quad \quad 3 \end{array} \right\}$ Charge draws back $\frac{1}{2}$. $\left\{ \begin{array}{l} \text{Thus, Adjudger - infert} \\ \text{draws } 3\frac{1}{2}; \text{ the annual-} \\ \text{renter } 3; \text{ and the other} \\ \text{adjudger } \frac{1}{2}. \end{array} \right.$

boddo in the case of *BINNING v. AUCHINBRECK*. It is also thus laid down by Mr. Erskine,—“The

Act 1661 regulates only the preference of apprisings, but does not affect any other feudal rights. On this head, a case occurred not a little perplexing, observed by Lord Stair. An apprising was led against a debtor's lands, on which sasine followed immediately, a right of annualrent was soon after granted by the debtor on the same lands, and after sasine was taken on that right, a second apprising was deduced against them within year and day from the date of the first. By a known feudal rule, the first apprising, which was perfected by sasine prior to the right of annualrent, is preferable to it, and the right of annualrent, though totally excluded by the first apprising, is, by the same rule, preferable to the second; nevertheless, the Statute 1661 expressly prefers the first and second apprising, *pari passu*. The Court, in a question that appeared so involved in contradictions, preferred all the three *pari passu*. It must appear, however, on a due consideration of the Statute, that the right of annualrent ought not to have been brought under the *pari passu* preference established among apprisers. It should have been ranked after the first apprising, and before the second, as if no such enactment had been made. The first appriser, on the other hand, ought to have been decreed to communicate to the second only such part of the sum for which he was ranked as he would have been cut out of, if no right of annualrent had been in the field, since the second appriser had himself to

blame for suffering that right to intervene between the first appriser and him, which he might have prevented by a more early diligence. The later decisions have reduced this matter to its true principles."—*Erskine*, 2, 12, 32.

6. The principles upon which the rule of ranking is grounded, are thus stated by Professor Bell:—"The principles," he observes, "are these—1. That the Statute 1661 subjected the first effectual adjudger to the necessity of communicating to succeeding adjudgers, within year and day, the benefit of his diligence, as if one adjudication had been led for all. 2. That this benefit was not to be communicated to the holders of voluntary securities. The consequence of which is, that the holder of an heritable bond cannot infringe upon or hurt a prior adjudger's right, if secured by infeftment. 3. That an adjudger, posterior to the heritable bond, must be postponed to that heritable bond, having by his delay forfeited the benefit of the statute, so far as it may be injurious to the heritable creditor. And, 4. That the posterior adjudger's interest, under the Statute, is no further injured than as it interferes with the heritable bond.

7. "The conclusion is, that, to give effect to these several rights, the true method is to make a double operation—first to rank the preferable adjudgers *primo loco*; the holder of the voluntary security *secundo loco*; and the posterior adjudgers *ultimo loco*; and then to allow the postponed adjudgers to draw back

from the preferable adjudgers all that the preferable adjudgers would have been obliged to yield to the posterior adjudgers, had the heritable bond been out of the field, and the adjudgers the only competitors: Or, what comes to the same thing, first, to rank the whole adjudgers *pari passu*; then hypothetically to rank the first adjudication *primo loco*, and the voluntary security *secundo loco*, and to form the final result by giving to the holder of the voluntary security, by way of drawback from the

postponed adjudgers, all that he would be entitled to draw in ranking only with the first adjudger, while the first adjudger retains his full dividend."—*Bell*, ii. p. 510.

8. According to the last of these modes, the first ranking determines the sum which the preferable adjudger is to receive, and the second ranking determines the sum which the holder of the voluntary security is to receive, leaving the postponed adjudger to rank for the balance which remains after these sums are deducted.

The Inhibition of a Creditor not adjudging does not affect a posterior Creditor adjudging, if the debt of one of the Adjudgers contracted prior to the Inhibition exceeds the value of the lands adjudged.

MILN v. CREDITORS OF NICOLSON.

IN ranking the creditors of Sir William Nicolson, on the estate of Cockburnspath, an inhibition used by Alexander Miln was sustained, but his adjudication was found null. Some creditors had adjudged, whose debts were contracted prior to the inhibition, and whose debts exceeded the value of the lands adjudged. Other creditors had subsequently adjudged, whose debts were contracted posterior to the inhibition, but whose adjudications were led within year and day of the first adjudication. The question arose, Whether the shares of the posterior creditors belonged to the inhibitor, in respect of his inhibition?

Feb. 15, 1698.

NARRATIVE.

PLEADED FOR THE INHIBITER.—The adjudgers whose debts were contracted posterior to the inhibition are excluded by the inhibitor. The dividends, therefore, that would have accrued to the posterior creditors, fall now to the inhibitor.

ARGUMENT FOR
INHIBITER.

The inhibitor may now lead an adjudication, and would be

MILN
v.
CREDITORS OF
NICOLSON.
1698.

preferred to the posterior creditors, for his adjudication would always draw back to the date of his inhibition, and would therefore always be preferable to those adjudgers whose debts were contracted posterior to the inhibition. By excluding the posterior creditors, the inhibitor comes in their room, and receives the shares which would have accrued to them if there had been no inhibition.

ARGUMENT FOR
POSTERIOR AD-
JUDGERS.

PLEADED FOR THE POSTERIOR ADJUDGERS.—The contracting of debts after the inhibition did not prejudice the inhibitor, because the debts contracted anterior to the inhibition were far above the value of the land adjudged. The inhibitor, therefore, would have taken nothing if no debts had been contracted after his inhibition. As, therefore, the inhibition could not prejudice prior adjudgers, the inhibitor cannot claim the shares accruing to the posterior adjudgers, who come in *pari passu* with the first adjudication. The shares of the posterior adjudgers fall to them by the concurrence of their diligence with the adjudication proceeding on grounds of debt prior to the inhibition. These debts being greater than the value of the estate adjudged, no part of its price belongs to the inhibitor.

First Interlo-
cutor.

On the report of Lord Mersington, the Lords found,—“That Carriden not having legally adjudged the estate of Cockburnspath within year and day of the first effectual adjudger, that he cannot by virtue of his inhibition draw any share of the proportions that the posterior creditors get of the price, in regard that the creditors whose grounds of debt are contracted before the inhibition, do much more than exhaust the value and price of the lands.”

JUDGMENT.
Feb. 15, 1698.

By their final judgment the Lords found,—“That an inhibition cannot be prejudged by posterior debts, nor anterior creditors prejudged by an inhibition. And found,—That the contracting of debts after an inhibition cannot be profitable to an inhibitor, nor does their diligence accresce to law. And likewise found,—That Carriden upon his inhibition cannot reduce the diligences of the posterior creditors, so as to affect the subject adjudged by them, and therefore can draw no share of the price of Cockburnspath.”

1. "Inhibition is only a negative or prohibitory diligence. It gives the creditor a right to reduce all posterior voluntary deeds granted by the debtor, but it has no positive effect towards transferring either the property or possession of the debtor's estate to himself. His debt, if it was personal before, continues such after the diligence. Nay, though the inhibitor should recover a decree voiding posterior deeds or contractions *ex capite inhibitionis*, such reduction of deeds granted to others cannot alter the nature of the debt due to himself, or give him access to the possession of his debtor's estate, which he cannot attain till he make his debt real by adjudication."—*Erskine*, 2, 11, 13.

2. "Where a deed is actually voided *ex capite inhibitionis*, the reduction has no effect, but in favour of the inhibitor himself. The deed continues in full force with regard to every other creditor of the inhibited, since the only ground of reduction is, that the deed was granted to the inhibitor's prejudice, according to the rule, *res inter alios acta, aliis neque nocet neque prodest*. The inhibition is not, therefore, pleadable by any of the inhibitor's co-creditors, who are third parties, nor can it alter the natural preference of their several debts. And, on the other hand, as the inhibitor cannot be hurt by debts contracted after his diligence, neither can he avail himself of them, so as to enlarge his own preference beyond what his grounds of debt naturally entitle him to. He draws from his debtor's funds as much

as he would draw if those posterior debts or deeds were not in the field, and no more."—*Erskine*, 2, 11, 14.

3. "Debts, though contracted after inhibition, cannot be voided *ex capite inhibitionis*, if the inhibitor could have drawn nothing from the debtor's estate, even supposing those posterior debts had not been contracted; because the inhibitor suffers nothing by such debts, since, though they had never existed, the fund of the inhibitor's payment would have been exhausted by debts preferable to his. Let the case, therefore, be put, that adjudications have been deduced against the debtor's estate, or debts contracted before the inhibition, that these adjudications exhaust the whole fund, and that other creditors have, upon debts contracted after the inhibition, adjudged the said estate within year and day from the first adjudication; the inhibitor, whom we suppose not to have adjudged, would have drawn nothing, though the posterior debts had not been contracted, being cut off by adjudications on debts contracted previously to his diligence. The posterior creditors, therefore, will draw *pari passu* with the prior, in consequence of the rule of preference, while, at the same time, the inhibitor will be excluded from the smallest part of the debtor's heritable estate."—*Erskine*, 2, 11, 17.

4. The case of *MILN v. THE CREDITORS OF NICOLSON*, relates to the operation of an inhibition only. The principle established in that case applies equally, however,

to every excluding right. If, therefore, instead of an inhibition, the excluding right had been a voluntary security intervening between two completed adjudications, led within year and day of each other, the voluntary security would have been altogether excluded, and the estate of the common debtor would have been divided between the two adjudgers only, if the debt of the first adjudger exceeded the value of the estate.

5. The principle on which this rule of ranking is founded is, that the excluding right is entitled to receive that share only which he would have received if the excluded right had not existed. In the case supposed of a voluntary security intervening between two completed adjudications, the holder of the voluntary right would have taken nothing if the posterior adjudication had not been led. The prior adjudger would have taken the whole to the exclusion of the voluntary right, as the debt of the former exceeded the value of the estate. The posterior adjudger is allowed to rank with the prior adjudger, in virtue of a privilege introduced by Statute, and he therefore shares the estate with the prior adjudger. But the holder of the voluntary security is not prejudiced by the operation of the Statute, for, independently of the Statute, the whole estate would have belonged to the prior adjudger. The diligence of the posterior adjudger cannot, therefore, accresce to the holder of the intervening security.

6. The operation of an inhibi-

tion proceeds on the same principle. The inhibitor is left in the same position in which he would have been placed if the rights struck at by the inhibition had not existed. He is not to be injured by the voluntary right, neither is he to be benefited by it. Accordingly, a voluntary security granted after an inhibition has been used is sometimes not affected by it. For if a personal creditor inhibiting has not adjudged, he has no right to share in the ranking. He can only claim from the creditor ranked, against whom his inhibition strikes, to the extent that he has been injured by the security granted to that creditor. If, however, it can be shown that the inhibitor could have taken nothing, although the subsequent security had not been granted, then the subsequent security is not affected by the inhibition.

7. In illustration of this principle, the value of the estate of the common debtor may be supposed to be £9000, the claim of the inhibitor to be £3000, that under the voluntary security granted after the inhibition also to be £3000, and the claim of each of two adjudgers whose debts were contracted prior to the inhibition, at £3000. In this case the inhibitor would secure payment of his debt in full. The adjudging creditors would also obtain payment in full, and the holder of the voluntary security would obtain nothing. But if the claim of the adjudgers had been £9000, the holder of the voluntary security would obtain payment in full. The adjudgers would obtain

payment to the extent of two-thirds of their claim, and the inhibitor would receive nothing. The same principle is applied in both cases, although its application is attended with very different results. In the former case, the inhibitor would have obtained payment in full, if the voluntary security had not been granted. He therefore claims to that extent from the holder of the voluntary security. In the latter case he would have received nothing, although the voluntary security had not been granted, for the adjudgers whose debts were contracted prior to the inhibition would have carried off the whole estate. The voluntary security, however, being preferable to the adjudgers, it is entitled to be ranked first on the estate, and so the holder of that security obtains payment in full.

8. If again the inhibitor had adjudged, as well as inhibited, he would have been entitled to have ranked along with the other adjudgers. In this view, the claim of the adjudgers would have been increased to £12,000, and after satisfying the voluntary security, there would have remained £6000 to be divided among the adjudgers, giving thus to each adjudger £1500. If, however, the voluntary security had not been granted, the share to each adjudger would have been £2250. The inhibiting adjudger is therefore entitled to claim from the holder of the voluntary security the sum of £750, being the difference between the sum which he receives along with the other adjudgers, and the sum which

he would have received had the voluntary security not been granted.

9. The principle upon which these different results depend was lost sight of by the Court in the case of *CAMPBELL v. GORDON*, Feb. 26, 1841. In that case, the objector Campbell had inhibited the common debtor in 1821. In 1827, the common debtor granted to the respondent Gordon, a bond and disposition in security for £6000, and infestment followed upon the bond. The ranking adopted by the common agent proceeded on the principle: *First*, That Campbell was entitled to the same privileges, as if he had obtained decree of reduction of Gordon's bond, *ex capite inhibitionis*; and *Second*, on the principle that Campbell was neither to suffer less, nor to derive benefit from the bond granted to Gordon. In applying these principles, he allowed Campbell to draw back from Gordon an amount sufficient to make up the dividend, which he would have drawn, if the bond to Gordon had not been granted.

10. In the Inner House, it was *PLEADED* for Campbell, that he had a right to draw payment of the debt on which his inhibition proceeded out of the funds received by Gordon, in virtue of his heritable bond, in respect that although the bond was effectual to exclude the other creditors from touching such part of the estate over which it extended as was necessary for its discharge, still as it had been granted, *spretu inhibitione*, it could not exclude the inhibitor from taking the amount

which it secured. The respondent PLEADED, that the inhibitor could not be entitled to receive more than the dividend which was allotted on her being ranked *pari passu* with the other creditors on the whole funds, that she was no doubt entitled to object to the security, as having been granted after the inhibition, and she had got the benefit of that objection by the bond being excluded when her dividend was calculated, but that she could not both approbate and reprobate the security, and plead that it was invalid, while at the same time she claimed the funds from which the other creditors were excluded by its means.

11. The Court found,—“That Mr. Gordon is preferable to the creditors, other than Mrs. Campbell, for the amount of his debt by virtue of his heritable security. But find that Mrs. Campbell, by virtue of the inhibition pleaded by her, is entitled to draw back from Mr. Gordon, the amount of her debt on which the inhibition proceeded.”

12. LORD GILLIES observed,—“In a question with Gordon claiming on the bond granted to him, Mrs. Campbell is entitled to be preferred. But in consequence of what has taken place, the sum of £6000 has been removed out of the fund, claimable by the personal creditors, and *quoad* that, the creditors are losers, for Gordon's bond is good against them. Now they being deprived of it, who is to benefit? So far as they are the losers, into whose possession are the funds to come? Are you

to give them to Gordon, who obtained an heritable security, *spretæ inhibitione*, or to the inhibitor? I think the inhibitor should be preferred to Gordon.”

13. LORD MACKENZIE observed,—“The heritable security granted after the inhibition had been used, being granted *spretæ inhibitione*, is undoubtedly struck at by the inhibition. Therefore, there is one creditor, namely, the inhibiting creditor, who can reduce that contraction, to the effect of adjudging the estate without exception of such part of, or such interest out of it, as is necessary for payment of the debt secured, whereas all the other creditors are, by the security, excluded from touching that part of, or that interest out of, the estate. The consequence must be, that the inhibitor is able to draw payment out of that estate so far as it falls under the security, *i.e.*, from the heritable creditor. This was fixed by the case of M'Lure. In that case, the deed done, *spretæ inhibitione*, was a sale, and the inhibitor drew payment out of the estate sold, *i.e.*, from the buyer; just as the inhibiting creditor here must do from the heritable creditor. In that case, however, the buyer not having paid the price, could withhold it in part from the other creditors for his indemnification, which, I presume, the heritable creditor here cannot do. But as we have before us no parties but the heritable creditor and inhibitor, we need not, and cannot, determine anything on that point. Of this, however, I am clear, that the inhibitor is entitled to draw pay-

ment from, or what is the same thing, be preferred to, the heritable creditor on the estate, or interest that falls to be carried by the heritable security."

14. On appeal, the judgment was reversed, August 2, 1842. LORD CAMPBELL observed,—"Since this case was argued at the bar, I have very deliberately considered it, and the impression on my mind at the close of the argument being strengthened, I do not now hesitate to advise your Lordships to reverse the interlocutor complained of. If the authorities brought to our notice had been cited before the learned Judges of the First Division of the Court of Session, which we understand they were not, I cannot help thinking that this interlocutor would not have been pronounced; for there seems no part of the law of Scotland better established than that upon which the present case depends. The question is,—Whether an inhibitor, under the circumstances, is to be placed in a better situation than he would have been in, if the transaction contrary to the inhibition had never taken place? This question does not appear upon the record, and was raised for the first time at the hearing in presence before the Inner House, upon an appeal respecting other matters from the Lord Ordinary, before whom no objection was made to the report of the common

agent, on the ground that it did not award payment in full to the inhibitor. The general rule, as laid down by all the institutional writers, ancient and modern, and founded on very solemn decisions, is, that inhibition being only a negative or prohibitory diligence, the inhibitor can neither be prejudiced nor benefited by a transaction *spreta inhibitione*. But this rule is said to have been broken in upon by the cases of *Munro v. Pointzfield*, *M'Lure v. Baird*, and *Lennox v. Robertson*. Of these cases, it is enough at present to say, that they do not apply; for supposing that, upon an alienation of the estate, where the inhibitor may adjudge, he is entitled to be paid in full, in this case, the inhibitor could not adjudge, for by the ranking and sale under the Bankrupt Act, neither the inhibitor nor any other creditor could have raised adjudication against any part of the lands or property embraced in the ranking and sale. There is nothing to take this case out of the general rule respecting inhibition, as the inhibitor could not by any diligence have placed himself in a better situation than he is placed in by the report of the common agent, if the inhibition had been strictly respected, and the bond had never been executed. I therefore move your Lordships that the interlocutor be reversed."—*House of Lords Cases, Bell*, I. p. 571.

Where the Inhibition used by one Adjudger is prior to an infeftment on a voluntary security, but posterior to the debts of the other Adjudgers, it affects the voluntary security only, and the holder of that security is not entitled to recur on the simple Adjudgers for the sum claimed from him by the Inhibiting Adjudger.

I.—COCKBURN'S CREDITORS v. LANGTON.

Jan. 20, 1709.

NARRATIVE.

IN the ranking of the creditors of Sir Alexander Cockburn of Langtoun, a competition arose among three classes of creditors. One class had inhibited and adjudged. Another class had adjudged, but for debts prior to the inhibition. A third class had obtained voluntary rights and infeftments of annual-rent, prior to the adjudger but posterior to the inhibition.

The annualrenters claimed, that as their infeftments were preferable to all the adjudgers, they ought to be ranked *primo loco*, before any adjudger could draw any share of the rents.

The inhibiting adjudgers claimed, that as the annualrenters were posterior to their inhibitions, the sums in their inhibition must be fully satisfied before the annualrenters could draw any share.

The simple adjudgers claimed, that as their bills were anterior to the inhibitions, the inhibitions could not prejudice their debts, and that they, as co-adjudgers with the inhibitors, ought to draw the same shares as if no inhibition had been used.

President
Dalrymple's
Decisions, p.
120.

The Lords, in 1691, after many hearings *in præsentia*, and very mature deliberation and reasoning among themselves, established the three following rules :—

First, That an inhibitor adjudger did not simply reduce posterior annualrenters, but only in so far as these annualrenters were prejudicial to the inhibitor.

Second, That inhibitors would draw such a share of the rents, or, in case of sale, such a share of the property of the estate as would have belonged to him if no posterior voluntary rights had been granted.

Third, That anterior creditors adjudging within year and day of the inhibitor, could not be prejudged by the inhibition, but that anterior creditors would draw the same share

of the common debtor's estate as if there had been no inhibition used.

These rules having been some years afterwards objected to by the creditors, were again submitted to the consideration of the Court.

COCKBURN'S
CREDITORS
v.
LANGTON.
1709.

PLEADED FOR THE INHIBITING ADJUDGERS.—In virtue of their inhibitions, the inhibitors are in a position to reduce and clear the estate of the posterior annualrents. In virtue of their adjudications, therefore, they are entitled to come in place of the excluded annualrenters, and draw full payment of the sum for which they inhibited. The ranking would take place thus—Suppose the common debtor's estate to be 12,000 merks, affected by a preferable infestment of annualrent for 6000 merks, and also by adjudications at the instance of three other creditors for 5000 merks each, and that one of the adjudgers had inhibited the common debtor before the date of the infestment of annualrent.

ARGUMENT FOR
THE INHIBITING
ADJUDGERS.

The rule of division ought to be this—The annualrenter first draws his 6000 merks, but then the inhibitor removes the annualrenter, and saves his whole 5000 merks, and so has a 1000 merks more than he would have received, if the annualrenter had not been in the field, and the 12,000 merks had been divided among the two other adjudgers and himself. Thereafter the annualrenter recurs upon the simple adjudgers, and as being preferable to them, draws his 6000 merks, leaving them only 1000 merks to divide between them.

Although an inhibition is not a positive, it is not simply a prohibitory diligence. It is also preparatory, and operates fully in behalf of the user for security of his debt, *ut nihil illi desit*. A creditor also, *qui sibi vigilavit*, by using inhibition, should reap the whole benefit of it. The inhibitors, therefore, may justly allege against the co-adjudgers, *vinco vincentem*, viz., the annualrenters, *ergo multo magis vinco te*, the simple adjudgers, who are excluded by the annualrenter without recourse. The brocard, *vinco vincentem*, always takes effect, except when it runs in a circle of creditors, supplanting one another, and though the inhibition excludes the annualrenters, in so far as they prejudice the inhibitor, the annualrents are good rights against the simple

COCKBURN'S
CREDITORS
v.
LANGTON.
1709.

adjudgers, and affect *unamquamque glebam* of the remainder of the estate. The simple adjudger again has nothing in common with the inhibitor, but takes what remains of the estate after deduction of the preferable annualrent, whereas an inhibiting adjudger is not bound to acknowledge the annualrent. If, however, the simple adjudgers, who are excluded by the annualrenters, were brought in *pari passu* with the inhibiting adjudgers, by whom the annualrenters were excluded, then those whom the annualrenters would have excluded, had it not been for the inhibitions, would reap by the inhibitors' diligence as much benefit as the inhibitors themselves did, which is absurd.

ARGUMENT FOR
THE ANNUAL-
RENTERS AND
SIMPLE AD-
JUDGERS.

PLEADED FOR THE ANNUALRENTERS AND SIMPLE ADJUDGERS. —No inhibiting adjudger can receive advantage by the contracting of debts after the inhibition. The security or diligence of posterior creditors does not accrue to an inhibitor as coming in their place. The debts of the simple adjudgers were contracted before the inhibitions in question. By the Act 1661, their adjudications come *in pari passu*, with those led by the inhibitors. The inhibitors have no farther benefit by their inhibitions, than to draw their shares of that proportion of the common burden of the annualrents, which would have affected them, as well as the other adjudgers, were it not for the inhibitions. The inhibitors, therefore, take the same sum which they would have taken, if the annualrenters had not been in existence. The ranking would have been as follows:—An estate worth £6000 being to be divided between two adjudgers, whereof each is creditor in £4000, and an annualrent corresponding to the like sum, anterior to the adjudication, but posterior to an inhibition used by one of the adjudgers. The annualrenter gets £2000, the simple adjudger £1000, and the inhibiting adjudger £3000. The reason of this is, that the £4000 of annualrent left but £2000 of the estate free to both the adjudgers—a £1000 to each, whereby the inhibitor wanted £2000 of what he would have got, had there been no annualrenter in competition. This difference of £2000 is therefore made up to the inhibitor out of the annualrenters' share.

The fundamental rules of the ranking now submitted are—*First*, That an inhibitor cannot be prejudiced by posterior

debts ; and, *Second*, That an anterior creditor cannot be prejudiced by an inhibition.

COCKBURN'S
CREDITORS
v.
LANGTON.

1709.

JUDGMENT.
Jan. 20, 1709.

The Lords found,—“ That in the competition of simple and inhibiting adjudgers and annualrenters, the inhibiting adjudger could only reduce the posterior annualrent, in so far as he was thereby prejudged, and that he could not claim full payment of the sums in his inhibition before the annualrenter could draw any share in the said competition, but could only draw such a share of the annualrents or price as he would have drawn, if there had been no posterior annualrent or voluntary right.”

LORD FOUNTAINHALL observes,—“ The Lords thought it of great importance for the readier expedition of rankings to fix the standard, and without varying, to make it a rule *pro futuro*, and therefore some of the Lords proposed to have some days to think better on it, which was yielded to.”

Fountainhall's
Decisions, vol.
ii. p. 480.
Jan. 11, 1709.

LORD FOUNTAINHALL again observes,—“ The competition of the creditors of Langton, mentioned January 11, was decided, and the vote being stated, whether the creditor inhibitor, who had likewise adjudged, was only to be preferred in so far as he would have been in case no posterior annualrents had intervened, or if he, upon reducing the infeftments of annualrent, the ground whereof is posterior to his inhibition, must come in his place, and have the full sum contained in his inhibition made up to him ? It carried that he should only draw a share, in so far as the annualrenter prejudged him, and as if the annualrent had never existed, but not to have his full sum. The Bench consisting of thirteen, it splitted six against six ; so it carried by the Lord President's vote. It was stated that the Lords might determine if the annualrenter might not recur, and carry away the annualrenters' share till he was paid ; they being posterior to him, though he was forced to yield his place to the inhibitor adjudger ; but this not being full pled, was not decided at this time.”

Jan. 20, 1709.

II.—CAMPBELL v. DRUMMOND.

March 3, 1730.

NARRATIVE.

In the ranking of the estate of Tofts, a competition arose among the creditors. Susanna Belshes inhibited the common debtor in 1672, and adjudged for the same debt in 1685. Pearson of Kippenross inhibited in 1673, and upon the same debt obtained an heritable bond of corroboration, with sasine upon it to 1679. There were a number of annualrenters subsequent to the inhibition used by Kippenross. There were also a number of adjudgers in 1685 coming *in pari passu* with the adjudication of Susanna Belshes, and whose debts were prior both to the inhibition used by her, and also the inhibition used by Kippenross.

In the ranking, the infetment of Kippenross was ranked *primo loco*. The posterior annualrenters were then ranked *secundo loco*. As this exhausted the fund, nothing was left to the adjudgers. Susanna Belshes was then ranked on Kippenross' dividend for what she would have drawn had the annualrenters not been in the field. Kippenross, in virtue of his inhibition, claimed to be allowed to draw from the posterior annualrenters the sum which Susanna Belshes had drawn from him. The annualrenters objected to this claim, on the ground, that if their debts had not been contracted, the adjudgers whose debts were contracted prior to Kippenross' inhibition would have drawn the sum allotted to them, and that, as he could have had no recourse against the adjudgers, so the posterior debts of the annualrenters did him no harm, and therefore his inhibition could take no effect.

First Interlocutor.
Feb. 14, 1730.

On the report of the LORD ROYSTON the following interlocutor was pronounced :—"The Lords find, That in as far as Susanna Belshes, in virtue of her inhibition, draws a part of the sum in Kippenross' infetment ; that he is preferable for drawing the sums from the adjudgers, whose adjudications are posterior to his infetment, albeit their grounds of debt be prior to his inhibition, except the proportion that would fall upon Susanna Belshes' adjudication, in respect her inhibition is prior to his infetment, to which he has no relief against the co-adjudgers."

On reclaiming petitions for both parties, the following interlocutor was thereafter pronounced :—"The Lords having heard the bill, with the counter-bill and answers, find, That inhibitors are to be ranked, as if the debts falling under the inhibition had never existed. Nevertheless they also find, That inhibitions can be profitable to no creditor but the inhibitor, and that the debts falling under the inhibition are to be ranked with the other creditors who have not inhibited, as if there had been no inhibition ; and consequently that Kippenross' infestment being prior to all the adjudications, he is to be ranked for the whole sum in his infestment, except so much thereof as would fall to be drawn from the adjudger who inhibited before the date of Kippenross' heritable bond."

CAMPBELL
v.
DRUMMOND.
1780.
Second Inter-
locutor.
Feb. 26, 1780.

The final judgment of the Court was as follows :—"THE LORD PRESIDENT having considered the debate, Finds, that the preference given to Susanna Belshes as inhibitor, is to be understood to extend no farther than the ground of the inhibition, which was upon a dependence, and there being a bond of corroboration of the decreet following upon that dependence, with a penalty and accumulation of annualrents : Finds, that in so far as the sums in the corroboration exceed the sums in the decreet, the inhibitor adjudger is in the same case with the other co-adjudgers ; and restricts the effect of the inhibition to the sums in the decreet corroborate. And having considered the last clause in the petitory part of the bill, desiring that the Lords would find Kippenross preferable for the whole sums in his infestment to the other annualrenters, whose debts are posterior to his inhibition, and having heard parties' procurators *viva voce* thereupon, finds, that according to the established rules of ranking, Kippenross' infestment and inhibition would indeed be preferable to all the other annualrenters save one, if the competition were singly amongst the annualrenters and him as inhibitor, which does not apply to the present case, because there are adjudications for sums exceeding the value of the subjects adjudged upon debts anterior to both the inhibitions at Susanna Belshes and Kippenross' instance, which are therefore preferable to them as inhibitors. And in respect that the whole annualrenters are in date prior to the adjudications, finds,

JUDGMENT.
March 8, 1780.
MS. Copy.
Kames' Session
Papers.

CAMPBELL
v.
DRUMMOND.
1780.

that Kippenross, as the preferable annualrenter by virtue of the inhibition, draws the whole debt due to him from the adjudgers proportionally, except so much as falls to the share of Susanna Belshes' decret, obtained on the dependence whereon inhibition was used : And find, that the annualrenters posterior to Kippenross' inhibition will, in the same manner, according to their dates, draw their annualrents from the adjudgers, except from Susanna Belshes as aforesaid ; and finds, that Kippenross has no title to recur upon the annualrenters posterior to his inhibition, for so much of his debts as he wants in respect of Susanna Belshes' inhibition, notwithstanding that these posterior annualrenters draw their annualrents in part from the adjudgers. In respect that as Kippenross by reason of his inhibition cannot be prejudged by the posterior annualrents, so neither can he be profited by his debtors contracting posterior debts, and though no annualrents had been contracted after Kippenross' inhibition, the debts in the adjudication would have exhausted the whole subject adjudged, and consequently, Kippenross could have drawn no more than a proportional share from the adjudgers who had not inhibited, which is allowed to him by the above scheme, and ordains the scheme to be drawn out accordingly."

1. " This course of adjudications hath bred several questions amongst adjudgers competing with annualrenters, or competing amongst themselves, when any of the competitors have ground of reduction against any of the rest, upon any of the grounds of preference before mentioned. If the estate affected be not sufficient to pay the annualrents of all the annualrenters and adjudgers, the question is, How the common factor shall pay them their shares of the rents ? Or, in case there be a judicial sale, How

they shall share of the price ? The method of division ordered by the Lords was thus :—That the adjudgers were to be accounted as joint proprietors, and the annualrents as servitudes on the property ; and, therefore, 1. The annualrents affecting the property, and every part thereof, behoved first to be satisfied in order according to their dates ; so that if the rent do not satisfy the whole annualrenters, those who were prior would carry all, and the whole adjudgers would be excluded. 2. If the rent free

exceed the annualrent of all the annualrenters, then the superplus is to be divided proportionally to the adjudgers, in respect the annualrents being all prior to the first effectual adjudication, the adjudgers could have nothing till the annualrenters were satisfied."—*Stair*, 4, 35, 26, 28.

2. "This is the rule of division, but all the former grounds of reduction are exceptions from the rule. So that if any of the competitors could reduce the right of another in a process of reduction, they may make use of the same reason in the competition. For instance, if any of the competitors had used inhibition against any others, in that case they would draw out of the share of those whom they could reduce, so much as to make up the share they would have had, if that reducible right did not exist; and yet that reducible right, albeit prior to the other rights, could not recur upon them, to make up what the reduction had carried from it, in favour of the reducing right, because the ground of reduction is always upon the fault or defect of the right reduced. As in the present instance, a right reducible *ex capite inhibitionis*, is faulty and defective, as proceeding against the King's authority, prohibiting to take any such right; and, therefore, it cannot claim to be made up out of any other right which is not faulty, which holds of the other grounds of reduction, as being *in cursu diligentiae*, &c."

3. "If, then, the inhibition be against some of the annualrenters,

in favour of another annualrenter, then the reducing annualrent, if by its order it would fall last, would carry from the reducible annualrents its share; but if both annualrents by their order fall to be satisfied, and are not cut off by their posteriority, then the reducing annualrent can claim no more, but preference to the reducible annualrent, in the choice of lands, in the case of division.

4. "If any of the adjudgers have inhibited before the constitution of any of the annualrents, these adjudgers would draw from the shares of these annualrenters as much as will make up the adjudger's share to that quantity they would have got, if these annualrenters were not existing. For instance, suppose there were two adjudgers and one annualrenter prior to both; and suppose that one of the adjudgers had inhibited before the constitution of the annualrent, and the other had not; suppose also that all the three had equal annualrents, as if each of them were upon a sum whose annualrent were 400 pound, and yet the free rent of the estate they affected were only 600 pound; the question is, How should this 600 pound be divided amongst them?

5. "The annualrenter would claim his full annualrent, being 400 pound, as being prior to both the adjudgers, whereby there would remain to the adjudgers but 200 pound, which would be equally divided betwixt them, because they are equal; so each of them would carry 100 pound; yet the adjudger who had the inhibition would

claim as much of the 600 pound, which is the common stock, as he would have had if there were no annualrenter, and so he would draw 300 pound, so that the annualrenter would have only remaining 200 pound, but could not return upon the other adjudger, as being prior to him; and therefore the first adjudger would retain his 100 pound, which would so hold, if the annualrent had been reducible upon the other grounds before expressed.

6. "If the ground of reduction be for one adjudger against another, as if there were three adjudgers, whereof each claims a yearly annualrent of 400 pound, in all 1200 pound, and yet the free rent were only 600 pound; if there were no ground of reduction, each adjudger would have 200 pound. But suppose the second adjudger had used inhibition against the common debtor, before the contracting of the third adjudger's debt, in that case the question is, How should the 600 be divided amongst the three adjudgers?"

7. "The first adjudger would have 200 pound, because the inhibition struck not against him, so that he would have his share, as if there had been no inhibition, which should neither profit nor prejudice him. The second adjudger having the inhibition, behoved to have his share, as if the third adjudger were not existing, in which case the 600 pound would have been equally divided betwixt him and the first adjudger, and so he must have 300 pound, but he can claim no more to abate the last adjudger's share, seeing his reduction does not

simply annul the last adjudication, but only in so far as it is prejudicial to the second adjudication; and, therefore, the first adjudger having drawn 200 pound, and the second 300 pound, the third hath 100 pound. This will hold, whatever be the number of the annualrenters or adjudgers who have inhibitions or other grounds of reduction against any of the rest."—*Stair*, 4, 35, 29.

8. The operation of the rules established by the Court in 1691, in the first branch of the competition among the creditors of Langton, and which were again confirmed in the same competition in 1709, is thus stated by Lord President Dalrymple,—“By this decision, the inhibitor did not obtain full payment of the sums in the inhibition before the annualrenter could draw any share, nor did the annualrenter lose all, but a part only. Nor was the annualrenter allowed to recur upon adjudgers for anterior debts for making up that share which the inhibitor reduced and cut off. As, for example, suppose the case, that the subject affected is worth 12,000 merks, and that there are three adjudgers *pari passu* for 5000 merks each, and one annualrenter effecting to 6000 merks, and that one of the adjudgers is also an inhibitor before contracting the annualrenter's debt, the division falls thus: The three adjudgers for equal sums do first divide the 12,000 merks in equal parts, whereof each draws 4000 merks, and thereby lose each 1000 merks; the annualrenter being a common

burden on the subject affected, and preferable to all the adjudications, claims 2000 merks from each of the three adjudgers, as a stock effeiring to his annualrent; but the inhibiting adjudger strikes off his claim by virtue of his diligence of inhibition, but the posterior adjudger having no defence, the annualrenter draws 2000 merks from each of them, whereby the inhibiting adjudger gets his full third share with the co-adjudgers, but loses 1000 merks of his whole sum, and the annualrenter loses 2000 merks, and gets 4000 merks, and the co-adjudgers get each 2000 merks of the remaining 4000 merks."—*Dalrymple's Decisions*, p. 120.

9. The case of *CAMPBELL v. DRUMMOND* presents a curious combination of interests. A manuscript copy of the final judgment has been preserved by Lord Kames, along with the Session papers in the cause. The judgment has been generally considered as a sound one, and as proceeding on the principles established in the competition of the creditors of *Langton*. The correctness of the judgment, however, may be doubted. It certainly proceeded on the principles established in the former case, but the circumstances of the latter case appear not to have admitted of that principle being applied. It is rather thought that the claim of *Kippenross*, that the sum drawn by *Susanna Belshes* should be paid by the posterior annualrenters, ought to have been sustained, but not upon the ground on which he rested the claim. The claim was rested on

the inhibition used by himself, but the claim so urged was conclusively met by the answer, that if the posterior annualrents had not been granted, the posterior adjudgers would have come in their place, against whom his inhibition could not have operated. The claim ought to have been rested, not on the fact of his own inhibition, but on the fact of the inhibition used by *Susanna Belshes*. That inhibition being prior to the posterior annualrenters, affected them as well as the infetment obtained by *Kippenross*. As, however, the infetments of the other annualrenters were posterior to that of *Kippenross*, the claim of *Susanna Belshes* ought to have been satisfied out of the sums accruing to the annualrenters, in the postponed order of their ranking. In this way, her claim would have fallen upon the annualrenter last in date. The error in the judgment arose from regarding the adjudgers as joint proprietors, and the annualrents as servitudes on the property. The proper mode of ranking is to rank the creditors, in the first instance, according to their real rights of preference, and then to allow the personal rights of preference to operate against the real rights affected by them, and where more than one real right is affected by the same personal right of preference, to allow it to operate against them in the postponed order of their ranking. In this way the inhibition used by *Susanna Belshes* would have operated against the posterior annualrenters, and thus

Kippenross would have received ever, not of his inhibition, but of payment in full, in respect, how- his prior real right.

When the Inhibition used by a Creditor adjudging is prior to several preferable Infestments, proceeding on voluntary rights, it affects the Holders of these Infestments in the postponed order of their Ranking.

I.—LITHGOW v. WHITEHAUGH.

[Jan. 10, 1747.

NARRATIVE.

IN ranking the creditors of Francis Armstrong on his estate of Whitehaugh, John Lithgow produced a preferable infestment over that estate. Two other creditors produced subsequent infestments. The Earl of Leven, who was one of the adjudgers, produced also an inhibition executed against the common debtor, before any of the debts secured by the three infestments were contracted. As the sums due to the three creditors infest more than exhausted the value of the estate, leaving nothing to the adjudgers, the question arose,—Whether the sum claimed by the inhibitor should be drawn from the shares of all the three creditors in proportion to their sums, or if it should be wholly drawn from the postponed creditors, allowing the prior one to draw his whole debt?

ARGUMENT FOR
PRIOR CREDI-
TOR.

PLEADED FOR THE PRIOR CREDITOR.—The first creditor infest ought to bear no burden of the inhibitor's debt. It ought to be laid wholly upon the last infestment. An inhibition gives no preference upon a right in any subject belonging to the common debtor. It is merely a prohibition directed to the lieges, not to deal or contract with the debtor, or to take from him any right to his lands or heritages. The effect of it is, that if any debt is contracted or right granted contrary to the prohibition, it will be reduced at the instance of the inhibitor, so that he may draw as much, as if these debts or rights had never existed. If no subsequent deed is granted by the common debtor, an

inhibition does not avail the inhibitor. He can draw nothing out of the common debtor's estate, unless he has affected it by an adjudication. And even where deeds are granted after the inhibition, the inhibitor has no title, in virtue of his inhibition, to be preferred or ranked on the estate of the common debtor. Those creditors only can rank who have affected the estate by infestment or adjudication, and the effect of the inhibition is only to set aside the deed struck at by it, that the inhibitor may draw the same sum he would have drawn if the deeds struck at had never existed.

LITHGOW
v.
WHITEHAUGH.
1747.

An inhibition does not operate for the benefit of any one except the person at whose instance it is used. Even in his favour it has no operation against any debt, though contracted after the inhibition, farther than in so far as that debt prevents the inhibitor from drawing what he would have drawn, if it had not been contracted ; for it is admitted, that no inhibitor can be prejudiced by the contraction of debts after his infestment.

The proposition, that an inhibition affects equally all debts posterior to it, as being all contracted *spretæ inhibitione*, is by no means true, as an inhibition is not a prohibition to the debtor to contract any debt whatever, but only to contract debt, whereby the debtor's estate may be evicted in prejudice of the inhibitor. An inhibition therefore affects only such debts as prejudice the inhibitor, but does not affect debts, whereupon even the lands are evicted, where that eviction does no prejudice to the inhibitor. An inhibition, for example, does not affect a subsequent debt where there are adjudications upon debts prior to the inhibition, which exhaust the debtor's estate, and where the inhibitor has omitted to adjudge on his debt within year and day of the first effectual adjudication. In that case, if a creditor, whose debt is after the inhibition, has adjudged within year and day of the other adjudgers, he will draw proportionally with them ; nor can the inhibitor challenge his debt, because he is not prejudiced by it, seeing that *esto* it had not been contracted, he could have drawn nothing, the estate being exhausted by debts, against which the inhibition did not strike.

In the present case, the inhibitor has nothing to do but to

LITHGOW
v.
WHITEHAUGH.
1747.

put out his hand and take his money from the creditor, who, in the ranking of the creditors struck at by the inhibition, is the last drawer. In that case he cannot say he is prejudiced by the creditor who is preferable in the ranking, for he draws all that he is entitled to. Nor can the last drawer oppose him, unless it could be maintained that the last drawer could plead a benefit to himself from the inhibition, which neither in reason, nor agreeably to principle, can any one do, other than the inhibitor himself, and even not he himself farther than he is prejudiced by the debt which he challenges.

The just conception of the whole matter is, that the interest which falls to the whole creditors struck at by the inhibition, is considered as a fund out of which the inhibitor draws *primo loco*, and all the others take the same rank among themselves upon the remainder which formerly they had. The consequence is, that what the inhibitor gets by his inhibition comes off the last drawer, who is affected by the inhibition; and if the part falling to such creditor does not satisfy the inhibitor, he takes next of the penult creditor, and so upwards, in the reverse order of the ranking.

It may be true, that schemes have been frequently approved, without distinguishing the cases where the loss occasioned by the inhibition should be allocated proportionally among the creditors struck at by the inhibition. That practice, however, has not been so universal as is alleged; and even if it was as universal as is alleged, the reasoning in point of principle brought to justify it, is such as has no foundation in law.

ARGUMENT FOR
POSTPONED
CREDITOR.

PLEADED FOR THE POSTPONED CREDITOR.—The scheme is in this case made out in the very same way that all schemes have been made, as far back as there is record of the practice of the Court. There is first a general ranking of the several debts, according to the dates of the infeftments; but when the creditor has drawn in this general ranking, and an inhibitor is to be satisfied of his debt, there is a second ranking or draught, by which the inhibitor takes back proportionally from each creditor in the general ranking struck at by the inhibition, without distinction of the priority of the infeftment amongst themselves.

The reason of this is, that an inhibition is a legal prohibition

issued against the debtor, discharging him from doing any deed by which any part of his lands may be evicted from him in prejudice of the inhibitor, and discharging the whole lieges from accepting any right from him, by which any part thereof may be evicted from him. The effect of this diligence is to set aside all deeds, simply and absolutely, which are granted *lege prohibente*, the first as well as the last. As therefore the inhibitor reduces all deeds granted after the inhibition, he is not allowed to load one and free another, but the law lays the burden proportionally.

LITHGOW
v.
WHITEHAUGH.
1747.

It is no less certain, that the creditor from whom an inhibitor draws any part of the sum, for which such creditor was preferred in the general ranking, cannot recur against the other creditor, though posterior to his infeftment, for the sums so taken from him, because *quoad* them, he has already drawn his whole debt, and cannot draw it over again. This would be to make them liable to repair a damage which he had suffered upon the account of a defect in his own right.

The Lords found,—“ That the inhibition being prior to, and therefore affecting all the annualrent rights, the deficiency arising from the shortcoming of the funds does not affect equally or *pro rata* all the annualrenters, who stand preferred the one to the other, but must affect the last ; and remitted to the Ordinary to direct the scheme of division accordingly.”

JUDGMENT.
Jan. 10, 1747.

On the Session Papers, LORD KILKERRAN has written,—“ Found by President’s casting vote, That the inhibitor is not to draw proportionally from each of the annualrenters, but must draw the whole from the last. For interlocutor, Minto, Kilkerran, Monzie, Tinwald, Shewalton. *Contra*, Drummorie, Strichen, Dun, Elchies, Murkle.”

MS. Notes.
Kilkerran’s
Session Papers.

LORD ELCHIES, in his Decisions, observes,—“ There being an inhibition and three infeftments of annualrent all posterior to it, and then an adjudication on the inhibition, the question was, Whether the annualrents should be first preferred and ranked in their order, and then the inhibitor to draw proportionally from each of them, which has been the general practice for fifty years ; or, if the inhibition must be ranked first, and next the annualrenters in their order, so as all the deficiency shall fall

Elchies’ Deci-
sions. Compe-
tition, No. 8.

LITHGOW
v.
WHITEHAUGH.
1747.

Elchies' Decisions, vol. ii.
p. 106.

on the last annualrenter ? By the President's casting vote this last carried, after long pleadings at the Bar and reasoning on the Bench. Adhered to."

In the Notes to his Decisions, LORD ELCHIES farther observes,—"The question was, Whether, when there were several different classes of annualrents or adjudications after an inhibitor, but whose claim of preference upon his adjudication is after them—whether the inhibitor's payment must be taken proportionally out of all the posterior annualrents or adjudications, which has been the practice hitherto ever since the creditors of Nicolson, or if the whole loss must fall upon the last ? The papers are very full both as to the precedents and as to the reasons of the thing and principles of law.

"This case was argued yesterday at the Bar, and this day very fully argued upon the Bench. Kilkerran first spoke short for Lithgow—next Dun against him—also Drummore very full and long—then Tinwald for him very long—next Minto short—then I spoke short against him for the other creditors—last of all the President for Lithgow. My reasons were chiefly because of the decision in the case of Nicolson, and fifty years' custom of the Court upon it ; that it was not true that an infestment cannot be prejudged by subsequent contractions, for if the debtor die, his heir's debts will not be affected by inhibitions against the predecessor, and therefore these inhibitions must affect the infestments of annualrent granted by him, and not those by his heir ; and it was admitted, that debts contracted before the inhibition, but less preferable than the annualrent, would have the same effect.

"If we alter the rule in this case, I see no reason why we should not alter the rule likewise in the case of infestments in different subjects, for the reason of the thing, the equity of the case, is the same in both. There is no necessity for altering the rule, because a creditor lending money to a person already inhibited, and taking infestment or annualrent, he can secure himself against subsequent contractions by using inhibition. They can secure themselves against both prior and posterior debts, who had not a prior infestment by a particular infestment of warrandice.

"By the President's casting vote, it carried that the infest-

ments must not be burdened proportionally, but the last must be burdened. *Pro*, were Minto, Kilkerran, Monzie, Tinwald, and Shewalton. *Contra*, were Drummore, Strichen, Dun, Murkle, *et* Elchies. We adhered, and Arniston was for it ; though, as he observed, a second or third or last annualrenter, purchasing the inhibition, would have been safe.”

LITHGOW
v.
WHITEHAUGH.
1747.

II.—COCKBURN'S CREDITORS v. LANGTON.

In the ranking of the creditors of Langton, there were three classes of creditors—creditors who had inhibited, creditors who were infest, and creditors who were not infest. The question arose,—Whether the sums drawn by the creditors who had inhibited, in virtue of their inhibitions, ought to be allocated proportionally among the whole debts that were struck at by the inhibitions ; or whether it should be allocated exclusively among the adjudging creditors who were not infest ?

Jan. 8, 1760.

NARRATIVE.

PLEADED FOR THE ADJUDGING CREDITORS NOT INFEST.—An inhibition is only a prohibitory diligence. Its object is to prevent the debtor from alienating his heritage to the prejudice of his creditor. It gives the inhibitor no preference or real right over the debtor's lands, until he establish it by other diligence. To consider inhibition as giving a preference, would lead to absurd consequences. For instance, if there were two annualrenters in the field, the first of whom only was struck at by the inhibition, and if the inhibitor, as having a preference, was ranked *primo loco*, and then the annualrenters in their order, this absurdity would follow—that the first annualrenter, though struck at by the inhibition, would draw his full debt, and yet the second annualrenter, against whom the inhibition did not strike, would be cut out. To prevent such absurdities, the real rights affecting the lands must be ranked in the first place, and draw according to their order, after that it falls to be considered what personal claims may lie against any of these creditors.

ARGUMENT FOR
CREDITORS NOT
INFEST.

An inhibition, though not a real right, affords a claim against

COCKBURN'S
CREDITORS
v.
LANGTON.
1760.

those who have obtained real rights from the debtor after he was inhibited. This is of the nature of a claim for damages, and the question is,—In what manner those damages are to be ascertained among the several creditors struck at by the diligence?

Every one of the debts and securities subsequent to the inhibition is equally liable to reduction. This is evident from the style of the diligence, by which the debtor is expressly prohibited from making any alienation, contracting any debt, or doing any deed, and the lieges are prohibited from accepting of any right or obligation from him, to the prejudice of the creditor. Every alienation and every contraction, therefore, is prohibited. It is no defence to one who contracts *spretæ inhibitione*, that he left sufficient funds to satisfy the debt of the inhibitor. The fund must be left unimpaired, as it was at the date of the diligence. To diminish it, the law considers as a prejudice done to the inhibitor. It is not necessary for him to qualify any other prejudice, or to allege that he is disappointed of his payment by the deed which he seeks to reduce. Nor is he obliged to enter into a litigation concerning the circumstances of his debtor.

Whatever sum a party struck at by an inhibition is obliged to repay to the inhibitor out of the sums he stood ranked for by his infestment, he cannot claim back from creditors afterwards infest, who are not affected by the inhibition, and who are therefore not obliged to relieve him of a sum drawn from him, upon a defect in his own right.

Where, again, the inhibition strikes against several purchasers or annualrent rights, affecting different parts of the same debtor's estate, the effect of it is allocated proportionally upon the several lands or heritable debts; and, if the inhibitor insists to draw his whole debt out of any one subject, he must assign his diligence to the person from whom he draws, that he may operate a proportional relief; upon the same ground that a creditor having a catholic infestment over several tenements, when he recovers his whole debt from the purchaser of one tenement, is obliged to assign to him his infestment, that he may recur against the rest.

In the same manner, a proportional allocation ought to take place where the inhibition strikes against several annualrent

rights or securities affecting the same tenement, as each of them is subject to a separate reduction at the inhibitor's instance. If one creditor obtains infestment from the common debtor after inhibition, in the tenement A, and another in the tenement B, they are no doubt equally liable to a proportion of the inhibitor's debt. It seems incongruous, then, to suppose that the proportional allocation should be excluded, because the creditors had got both tenements comprehended under their infestments.

COCKBURN'S
CREDITORS
v.
LANGTON.
1760.

Upon the same principle, if two heritable creditors consent to a subsequent contraction, the creditor consented to may insist against either; but as he who pays is entitled to demand an assignation, the result must be a proportional distribution. This case is extremely analogous to the present. It may be said without impropriety, that one who contracts after inhibition virtually consents to the payment of the inhibitor's debt.

PLEADED FOR THE CREDITORS INFEST.—The tendency of an inhibition, as is evident from the style of it, is not absolutely to restrain the inhibited person from contracting debts, or the lieges from dealing with him, but only in so far as the inhibitor may thereby suffer prejudice. In other respects, the creditors fall to be ranked, and draw their payment without regard to the inhibition. The inhibitor sustains no prejudice so long as there is a sufficient fund for paying his debt. He cannot, therefore, interfere in the ranking.

ARGUMENT FOR
CREDITORS IN-
FEST.

What proves that inhibition has no effect unless the inhibitor can qualify a loss, is, that debts, though contracted posterior to the inhibition, if the inhibiting creditor sustains no prejudice from them, will draw a part of the price, while the inhibitor draws nothing. If, for example, there are adjudications against which the inhibition does not strike, and which are sufficient to exhaust the whole price, the inhibiting creditor must be entirely set aside, while, at the same time, other adjudgers, though posterior to the inhibition, if within year and day of the former, will be ranked *pari passu* with them.

It would be destructive of the records, that a person who lent his money, and for security took infestment upon a large estate, which he saw from the Records was liable to no prior encum-

COCKBURN'S
CREDITORS
v.
LANGTON.
1760.

brance, but an inhibition for a small sum, should suffer prejudice by posterior infeftments granted to other creditors. The prior infeftment upon record has, by law, the same effect against posterior infeftments as the inhibition has, with respect to all debts posterior to it. As, therefore, the inhibitor is entitled to draw his payment out of the first and readiest of the price, any loss arising from the deficiency of fund ought to fall upon the least preferable infeftment.

The argument drawn from several purchases or infeftments, affecting different parts of the same debtor's estate, does not apply to the present case, where all the creditors have their security upon the same subject, for here the first annualrenter is as much preferable to the posterior ones as the inhibitor is to them all ; whereas, in the other case, the different purchasers or annualrenters have no connexion with one another.

In the same manner, where the annualrenters are all in *pari casu*, and there is one catholic infeftment preferable to the whole, equity obliges the creditor to take his payment proportionally from the whole, or to assign ; but where the creditors have their security upon the same subject, preferable amongst themselves, according to the priority of their infeftments, no equity can entitle the last infeft to draw anything, while a preferable creditor is unsatisfied.

Upon these principles, the judgment of the Court was founded in the case of the creditors of Whitehaugh. That solemn decision, pronounced with great deliberation, was understood to fix the rule in all time coming, and accordingly has been uniformly followed in all the rankings that have since occurred.

JUDGMENT.
Jan. 8, 1760.

The Lords found,—“ That although the inhibitions, being prior to the competing annualrent rights, did strike against them all equally, yet any deficiency arising from the shortcoming of the fund of payment, did not affect equally, or *pro rata*, all the competing annualrent rights, which stood ranked and preferred one to the other, according to the priority of their infeftments, but that the same must affect the annualrenters least preferable.”

1. The interlocutor in the case of Nicolson, founded on by the posterior creditors, and referred to by Lord Elchies in the case of Lithgow, was in these terms:—
 “ Finds, That the inhibitors, after they have drawn their shares as adjudgers, may recur against the infestments of annualrent, or adjudgers whose bonds are granted after executing the inhibition, and have right and preference to draw out of the shares of the reduced rights proportionally, to make up the shares they would have drawn, if that reduced right did not exist, and had been no burden upon the estate: And finds, That the reduced rights, though prior to the other rights, cannot recur upon them to make up what the reducing rights shall carry from them in favour of the reducing rights.”

2. The several cases that have been given relative to the ranking of adjudgers and other creditors, appear to establish the following principles, for the purpose of adjusting their respective rights:—
First, An excluding right is not to be prejudiced, but, at the same time, is not to be benefited, by the right excluded. *Second*, An excluding right operates against those rights only which are affected by it. *Third*, A prior excluded right cannot recur upon a postponed right not affected by the excluding right. *Fourth*, Where there are two or more excluded rights, the excluding right operates against them, not *pro rata*, but in the postponed order of their ranking.

3. Professor Bell has laid down

the following canons, by which the interests of the several creditors ranking on the common debtor's estate ought to be regulated. He observes, “ The *First* operation in the ranking and division is, to set aside for each of the creditors who hold real securities, the dividend to which his real right entitles him, without regard to the exclusive preferences.

“ *Second*, The rights of exclusion are then to be applied in the way of drawback from the dividends of those creditors whose real securities are affected by them, taking care that they do not encroach on the dividends of other creditors.

“ *Third*, The holder of such exclusive right is entitled thus to draw back the difference between what he draws upon the first division, and what he would have drawn, had the claim struck at by the inhibition not existed.

“ *Fourth*, If the exclusive preference affects more than one real security, it is to be applied against those creditors only by whose ranking on their real right the holder of it suffers prejudice; against the last, for example, of the postponed creditors affected by it, in the first place; and so back, till the holder of the exclusion draws all that he would have been entitled to draw had the excluded claims not been ranked. If it affects a number of creditors entitled to rank *pari passu*, it will affect them proportionally to the amount of their several debts.

“ *Fifth*, Where there are secondary consents and exclusions among those holding exclusive

preferences, they are to have effect only against, and in favour of, the parties by and to whom they are granted, without benefiting or hurting other creditors. This is to be accomplished by applying the original exclusion in the first place, and then giving to the person in whose favour the secondary consent is granted, a right to draw back from him who grants it, a share of his dividend, equivalent to the sum which would have fallen to the person favoured, had the first exclusion not been in existence."—*Bell's Com.*, ii. p. 521.

SECTION VI.

ADJUDICATION IN SECURITY.

*Land may be Adjudged in Security of a future or contingent Debt,
where the Debtor is vergens ad inopiam.*

I.—NISBET *v.* STIRLING.

IN 1754, William Stirling executed a bond of provision in favour of his daughter Janet, spouse of Patrick Nisbet, whereby he became bound to pay £250 sterling to her, at the first term of Whitsunday or Martinmas after the decease of her mother, Elizabeth Murdoch.

NARRATIVE
Feb. 18, 1759.

Upon the death of William Stirling, his son Walter succeeded to his whole estate, heritable and moveable, with the burden of his mother's jointure, and the above provision to his sister.

Patrick Nisbet brought a process of constitution against Walter, concluding, That he should be personally decerned to make payment of the debt against the term of payment, upon which he obtained decree. During the dependence of the action, he raised inhibition and arrestment against Walter, who thereupon presented a petition to the Court, complaining of these diligences, as oppressive and hurtful to his credit. The pursuer agreed to pass from his arrestment, but the Court likewise recalled the inhibition.

The pursuer next brought a process of adjudication in security, founded upon his decree of constitution, but superseding execution till the term of payment should arrive.

PLEADED FOR THE PURSUER.—By the law of Scotland, a cre-

ARGUMENT FOR
PURSUER.

NISBET
v.
STIRLING.
1759.

ditor in a just and liquid debt, *cujus dies cedit, licet nondum venerit*, is entitled to the diligence of the law for the security of his debt. He is not allowed to proceed to execution till the term of payment is come ; but there can be no reason to hinder him from securing his payment against that term. A debt due, *in diem*, is as onerous a debt, and equally entitled to security as any other debt can be. A creditor in a debt already due, has many ways of recovering payment by immediate execution ; whereas a creditor, *in diem*, has his hands tied up from execution ; and if he is not entitled to do diligence for security, he must often lose his debt, though his all were at stake, and although he plainly foresaw the approaching bankruptcy of his debtor. The adjudication which the pursuer demands is no step of execution. It is only a means of securing the debt when it shall become due ; and, till that period, can have no consequences hurtful to the debtor, however useful it may be to the creditor.

This diligence for security is the legal remedy, competent to every creditor *in diem* ; not an extraordinary remedy, to be granted only when the debtor is *vergens ad inopiam*. Where malice and emulation appear clearly to be the motives of proceeding, a creditor may indeed be barred from his legal security, but where nothing of that kind appears, the law must have its effect ; and every creditor must be allowed to take proper care of his own interest. In the present case, the defender's circumstances, as a young man, deeply engaged in trade, sufficiently point out a reason for the pursuer being anxious to have a proper security for his debt. The fortunes of all merchants are precarious, and it is a very nice and difficult matter to know when a merchant is *vergens ad inopiam*, as the greatest bankruptcies often happen in the most sudden and unexpected manner. Besides, to be obliged on an occasion of this kind to point out even just causes of suspicion, would do a merchant's credit much more harm than any right in security could do.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The ancient diligence of apprising in the law of Scotland, as well as that of adjudication, which was introduced to supply its place, by the Statute 1672, are properly executory diligences, and proceed upon the sup-

position that the debt is due, and that the debtor is *in culpa* in not performing his obligation. From the whole style of the Acts of Parliament, and the words and procedure in these diligences, it is obvious that they do not apply to debts that are not become due.

NISBET
v.
STIRLING.
1759.

No creditor has, *de jure*, a title to demand the legal diligence of adjudication, unless he can subsume that his debt is due, and ought to have been paid before his demand of adjudication. It is true, that the Court has sometimes allowed adjudications to be led for security of debts before the term of payment. But this is not founded either on the common law or on any Statute. It is an interposition of the *nobile officium* of the Court, and is never exercised but in cases where a creditor, without such interposition, is in imminent hazard of losing the subject to be affected by his diligence. For instance, when other creditors, whose debts are become due, are carrying on diligence by adjudication, if a creditor, *in diem*, is not allowed to concur with them within the year, he must be totally excluded, and therefore the Court will allow him to lead an adjudication in security.

Such was the case of Easter Ogle ; but no instance has occurred where an adjudication was allowed before the term of payment of the debt, unless where the creditor was in apparent hazard of losing his debt, if not allowed this extraordinary remedy. In all cases it is incumbent on the creditor, who applies for such extraordinary interposition, to prove the necessity of it, from the hazard he is in of the subject being evicted from him by the diligence of others. Without such evidence, the Court will not interpose, to put a weapon in his hand, which the law does not give him, in order to distress a solvent debtor, who is ready to pay his debt as soon as it becomes due, or can be demanded.

The Lords found,—“ In respect that an adjudication in security, before the term of payment of the sum adjudged for, is an extraordinary remedy, not allowed, except when the creditor is in danger otherwise of losing his debt, and there is no sufficient ground of such hazard alleged, and that the Lords, upon the like grounds, recalled an inhibition used for the debt now intended to be adjudged for, sustain the defence, and assoilzie.”

JUDGMENT.
Feb. 16, 1759.

II.—WALLACE DUNLOP'S CREDITORS *v.* BROWN AND COLLINSON.

Nov. 14, 1781.

NARRATIVE.

Sir Thomas Wallace sold a part of his lands to Messrs. Brown and Collinson, according to a signed rental, which he became bound to warrant for twenty-seven years. Upon this obligation of warrandice, Messrs. Brown and Collinson led an adjudication in security against Sir Thomas' other lands and estates. To this adjudication the other creditors objected.

ARGUMENT FOR
CREDITORS.

PLEADED FOR THE CREDITORS. — No illiquid debt can be secured by adjudication. An adjudication in security is of that sort which has come in place of apprisings, with this difference only, that the legal never expires. It is therefore properly a sale under a perpetual power of redemption, but still it is a sale, and as such requires a liquid price. The adjudication in question, however, is founded on as a security, not only for the deficiencies alleged to have been already incurred, and which have not been liquidated by any decree, but also for deficiencies which do not now, and may never exist.

ARGUMENT FOR
ADJUDGERS.

PLEADED FOR THE ADJUDGERS.—It is admitted, that an adjudication for payment cannot proceed, except upon a liquid debt. But this rule does not hold with respect to adjudications in security. The reason of the distinction is obvious. By the old form of apprisings, as much of the debtor's heritage was given to the creditor as was reckoned equivalent to his debt, and unless the debt was liquid, the Sheriff could not possibly determine what quantity of land it was proper to make over. The same reason holds in special adjudications upon the first alternative of the Act 1672 ; and, even in general adjudications for payment, it is necessary that the debt should be liquid, in order that the debtor may know the precise amount of the redemption money.

But these reasons do not apply to adjudications in security ; for though they are always general, and extend to the debtor's whole heritage, yet as the legal never expires, the property can never be thereby transferred to the adjudger. Neither is it here necessary that the debtor should know the precise

amount of the debt ; because he may at any time recover his lands, upon showing that the creditor has been fully satisfied.

Accordingly, this sort of adjudication has ever been considered as a competent way of affecting the debtor's heritage, in security of such debts as can only be liquidated, *de anno in annum*, or of such as cannot properly be the foundation of an adjudication for payment. Thus, a widow may adjudge in security of her liferent ; a cautioner in security of his relief ; and a purchaser in security of his warrandice. These several claims are not more liquid than the present. Like it, they are contingent on future events ; but they are all equally capable of being secured by adjudication.

DUNLOP'S CREDITORS
v.
BROWN AND COLLINSON.
1781.

The Court " Repelled the objections to the interests produced for Messrs. Brown and Collinson ; sustained the adjudication at their instance, and remitted to the Lord Ordinary to proceed accordingly."

JUDGMENT.
Nov. 14, 1781.

In the Faculty Report of the case, it is stated—" The Court had no difficulty upon the competency of the adjudication as a security for both the past and the future deficiencies, and therefore repelled the objection."

1. Adjudication in security has been classed under the title of Transmission of Land on account of its connexion with Adjudication in Implement and Adjudication for Debt. It does not, however, form a proper title to land, for it can by no lapse of time or act of the creditor become an absolute title. It remains ever a security merely. It differs, therefore, materially from either of the two other kinds of adjudication. In an adjudication in implement there is no legal. The title is absolute from the first. In adjudication for debt, there is a

legal which may be foreclosed by a declarator, or extinguished by the positive prescription. In an adjudication in security, the legal is perpetual, and so can neither be foreclosed or extinguished.

2. " Delay or *mora* is not that time which, by the adjection of a day or condition, or which by law is allowed to perform ; but that time which runs after lawful delay is past, and is the debtor's fault in not performing his obligation. In obligations to a day, delay is incurred by the passing of the term, *nam dies interpellat pro homine*. In

II.—W

Nov. 14, 1781.

NARRATIVE.

Sir
and
be
tARGUMENT
CREDITO

debtor objected, that if execution were allowed, the very end of suspending the term of payment would be disappointed, and as the creditor had taken the bond in terms suspending the term of payment, he must abide the day to which the payment had been suspended. Lord Fountainhall observes, — “The Lords thought there could not be one general rule for this case. Where there was no hazard of dilapidation, it was not to be allowed; but here it was expressly informed that the debtor was *vergens ad inopiam*, and his circumstances much worse than when he gave the bond; therefore they remitted to the Ordinary to take what evidences he could get of his condition; and if he found it dubious, then to adjudge, unless the debtor offered sufficient caution to pay the debt when the term of payment should come: On which offer the adjudication was to stop, even as arrestments laid on upon bonds, whereof the term is not come, whether as the ground of arrestment or the debt arrested, may be loosed upon caution.”—*Fountainhall*, vol. ii. p. 659.

5. In the case of *LYON v. THE CREDITORS OF EASTER OGLE*, January 24, 1724, a daughter led an adjudication against her father in security of provisions payable to her, under her father's contract of marriage before the term of payment had come, but when other creditors of her father were doing diligence against his estate. The other creditors *PLEADED*,—That adjudications upon any debt

3. SIR JOHN NISBET of DIRLETON, in his Doubts, asks, “What course should be taken when the debt is *in diem*, and the term of payment not come, and the debtor's estate comprised, and the comprising for other debts like to expire before the creditor *in diem* can have a decreet, and execution thereupon?” Sir James Stewart, in his answer, replies, “I should think that this creditor *in diem* might be allowed to adjudge for security in the terms of the debt, even as a creditor for relief or warrantice is allowed to adjudge in security before distress.”—*Dirleton's Doubts—Debitum in diem*.

4. In the case of MR. ROBERT BLAW, July 14, 1711, the question was raised, Whether a creditor, in a bond whereof the term of payment was suspended till after the debtor's death, might raise adjudication of the debtor's lands for security of his money superseding execution, till the term of payment were come and bygone? The

before the term of payment of it, and especially in the case of provisions to children, could not compete with adjudications led upon bonds, the terms of payment upon which were come and bygone, and on which the law had allowed *paratam executionem*. The daughter PLEADED,—That since she was clearly a creditor by the obligation, an adjudication was the only proper diligence for securing her claim, and enabling her to compete with her father's other creditors, who otherwise would exclude her. The Lords found, "The creditors not preferable, but that the daughter must come in *pari passu* with them according to their several diligences."

6. The case of STRACHAN v. CREDITORS of STRACHAN, January 22, 1752, was also the case of a child adjudging in security of his provision under his father's marriage contract. It is thus reported by LORD ELCHIES in the Notes to his Decisions, "Strachan of Dalbrackie, being bound by his contract of marriage to pay certain sums to the children to be procreated, according to their number, at the terms of payment therein mentioned, and in the meantime to aliment them, Ludovick, the only son, took a decreet of £20 sterling of yearly aliment, till his portion should fall due, and thereupon, and upon the obligation in the contract for the portion, adjudication in security. But in the competition of creditors, we found that he could not,

upon the indefinite obligation to aliment, compete with his father's onerous creditors. But we repelled the other objections to the adjudication, viz., that in the decreet of constitution of the aliment, or adjudication in security, he had not brought a proof against his father, that he was a son, or the only child of the marriage; that he had no decreet of constitution of the aliment, but had adjudged on the contract: and that he had not libelled the two alternatives of the Act 1672; in respect it was only an adjudication in security, and not in payment, which he could not have, the term of payment not being come."—*Elchies' Decisions*, vol. ii. p. 14.

7. Erskine observes,—“Though apprisings; because they were judicial sales, could not be led on debts whereof the terms of payment were not yet come; yet adjudications, which are as truly transmissions of property as apprisings were, have been sustained by our supreme Court, *ex nobili officio*, upon debts before their term of payment, in the special case where the debtor was *vergens ad inopiam*. But such adjudications, as they are grounded solely upon equity, subsist only as securities, and cannot, by any length of time, become irredeemable rights. They seem, however, to be entitled equally with other adjudications to the *pari passu* preference established by the Act 1661, as to the principal sum and interest.”—*Erskine*, 2, 12, 42.

COCKBURN'S
CREDITORS
v.
LANGTON.
1760.

brance, but an inhibition for a small sum, should suffer prejudice by posterior infestments granted to other creditors. The prior infestment upon record has, by law, the same effect against posterior infestments as the inhibition has, with respect to all debts posterior to it. As, therefore, the inhibitor is entitled to draw his payment out of the first and readiest of the price, any loss arising from the deficiency of fund ought to fall upon the least preferable infestment.

The argument drawn from several purchases or infestments, affecting different parts of the same debtor's estate, does not apply to the present case, where all the creditors have their security upon the same subject, for here the first annualrenter is as much preferable to the posterior ones as the inhibitor is to them all ; whereas, in the other case, the different purchasers or annualrenters have no connexion with one another.

In the same manner, where the annualrenters are all in *pari casu*, and there is one catholic infestment preferable to the whole, equity obliges the creditor to take his payment proportionally from the whole, or to assign ; but where the creditors have their security upon the same subject, preferable amongst themselves, according to the priority of their infestments, no equity can entitle the last infest to draw anything, while a preferable creditor is unsatisfied.

Upon these principles, the judgment of the Court was founded in the case of the creditors of Whitehaugh. That solemn decision, pronounced with great deliberation, was understood to fix the rule in all time coming, and accordingly has been uniformly followed in all the rankings that have since occurred.

JUDGMENT.
Jan. 8, 1760.

The Lords found,—“ That although the inhibitions, being prior to the competing annualrent rights, did strike against them all equally, yet any deficiency arising from the shortcoming of the fund of payment, did not affect equally, or *pro rata*, all the competing annualrent rights, which stood ranked and preferred one to the other, according to the priority of their infestments, but that the same must affect the annualrenters least preferable.”

1. The interlocutor in the case of Nicolson, founded on by the posterior creditors, and referred to by Lord Elchies in the case of Lithgow, was in these terms:—
 “Finds, That the inhibitors, after they have drawn their shares as adjudgers, may recur against the infetments of annualrent, or adjudgers whose bonds are granted after executing the inhibition, and have right and preference to draw out of the shares of the reduced rights proportionally, to make up the shares they would have drawn, if that reduced right did not exist, and had been no burden upon the estate: And finds, That the reduced rights, though prior to the other rights, cannot recur upon them to make up what the reducing rights shall carry from them in favour of the reducing rights.”

2. The several cases that have been given relative to the ranking of adjudgers and other creditors, appear to establish the following principles, for the purpose of adjusting their respective rights:—
First, An excluding right is not to be prejudiced, but, at the same time, is not to be benefited, by the right excluded. *Second*, An excluding right operates against those rights only which are affected by it. *Third*, A prior excluded right cannot recur upon a postponed right not affected by the excluding right. *Fourth*, Where there are two or more excluded rights, the excluding right operates against them, not *pro rata*, but in the postponed order of their ranking.

3. Professor Bell has laid down

the following canons, by which the interests of the several creditors ranking on the common debtor's estate ought to be regulated. He observes, “The *First* operation in the ranking and division is, to set aside for each of the creditors who hold real securities, the dividend to which his real right entitles him, without regard to the exclusive preferences.

“*Second*, The rights of exclusion are then to be applied in the way of drawback from the dividends of those creditors whose real securities are affected by them, taking care that they do not encroach on the dividends of other creditors.

“*Third*, The holder of such exclusive right is entitled thus to draw back the difference between what he draws upon the first division, and what he would have drawn, had the claim struck at by the inhibition not existed.

“*Fourth*, If the exclusive preference affects more than one real security, it is to be applied against those creditors only by whose ranking on their real right the holder of it suffers prejudice; against the last, for example, of the postponed creditors affected by it, in the first place; and so back, till the holder of the exclusion draws all that he would have been entitled to draw had the excluded claims not been ranked. If it affects a number of creditors entitled to rank *pari passu*, it will affect them proportionally to the amount of their several debts.

“*Fifth*, Where there are secondary consents and exclusions among those holding exclusive

QUEENSBERRY'S
EXECUTORS
v.
CRAUFORD
TAIT.
1817.

judge in security, but that is quite a different sort of adjudication from the present, which is an adjudication on the Act 1672, c. 19, coming in place of the old apprising, and which is limited to the case where the creditor is entitled to instant payment.

"Long before the Act 1672, adjudications of various kinds had been introduced by the Court from necessity, *e. g.* adjudications in implement, adjudications in security, &c. But the style of such an adjudication in security is quite different from that of an adjudication for payment. The summons of adjudication for payment merely sets forth the debt, and concludes that the Court shall adjudge the subjects to the pursuer for payment of the debt; but the summons of adjudication in security, besides setting forth the debt, sets forth the circumstances rendering it necessary to adjudge in security, and concludes that the Court shall adjudge in security.

"This distinction is illustrated by the case, Creditors of M'Neil v. Saddler, 7th March 1794. It does not follow, because a creditor may in certain cases obtain an adjudication in security, that he is entitled to libel as for a first adjudication under the Act 1672, and to ask the Court to decern, reserving, *contra executionem*, objections such as that which occur in this case, that the debt is not exigible.

"In some cases of first adjudication under the Act 1672, the Court gave decree, reserving objections *contra executionem*, *e. g.* where a debt is exigible, but where, owing to partial payments, &c., it must require some time to ascertain the precise amount; but the Court do not follow that course, where the objections to payment are such as occur in this case, totally and instantly verified."

Where the pluris petitio is not very great or culpable, an adjudication will be restricted to a security, but otherwise it will be reduced in toto in a question with other creditors.

M'NEIL'S CREDITORS v. SADDLER.

March 7, 1794. IN 1758, William Saddler entered into copartnership with
NARRATIVE. M'Neil. The business was carried on under the management

of M'Neil, and on the dissolution of the company, in 1761, he was entrusted to wind up the affairs. In 1763, he left St. Christopher's, carrying with him effects belonging to the company, to a considerable amount.

M'NEIL'S CREDITORS
v.
SADDLER.
1794.

In 1764, Saddler raised a summons of constitution against M'Neil, for payment of the random sum of £10,000, which it was stated "would appear to be due to the pursuer upon a just count and reckoning." Appearance was made for the defender, who denied the libel, and stated, "That it was led for a random sum unsupported by evidence." The pursuer answered, That there were already adjudications led against the defender, and that, therefore, in order to put the pursuer in *pari casu* with them, it was necessary that decree should be pronounced, reserving all defences *contra executionem*. A decree was accordingly obtained under this reservation.

A summons of adjudication was then raised by Saddler, narrating the decree of constitution, and the reservation which it contained; and in this action he obtained a decree for payment of the accumulated sum of £10,724.

In 1780, this decree was produced as an interest for the heir of Saddler, in the ranking of M'Neil's creditors. A remit was then made to an accountant, to ascertain the precise balance due by M'Neill. The accountant reported that no more than £800, 10s. 7½d. currency of St. Christopher's was due. The other adjudgers on M'Neil's estate then contended that the adjudication was null *in toto*.

PLEADED FOR THE PERSONAL CREDITORS.—The decree of constitution, and, of consequence, the adjudication, are fundamentally void, as having been obtained without any proof of the debt. Neither will the reservation which it contained, of all objections *contra executionem*, support it. The only cases where such reservations have any effect, are those requiring dispatch, where the pursuer shows proof of the libel, *ex facie*, legal and sufficient, and the defender states defences which cannot be instantly verified.

ARGUMENT FOR
PERSONAL
CREDITORS.

Supposing it had been competent for Mr. Saddler to have adjudged, he mistook the proper form. As his claim was illiquid and contingent, in place of adjudging for payment on

M'NEIL'S CREDITORS
v.
SADDLER.
1794.

the Act of 1672, he ought to have led an adjudication in security, the legal of which never expires.

The extravagant *pluris petitio* would of itself be fatal to the adjudication, even if it were otherwise unexceptionable. It was led for £10,724, and it turns out, that there is only £800, 10s. 7½d. currency due.

In adjudications upon the Act 1672, as well as in the old appraisings, the debt, for which the lands were adjudged, is, in law, held to be a price commensurate to their value, for which the lands are sold under reversion ; and, as it does not follow, that because the debtor allows them to be adjudged, and sold for a particular sum, he would have done so, if the sum had been less, the consequence must be, that an adjudication ought to be set aside, when the debt turns out to be less than the sum adjudged for. Accordingly in practice, a *pluris petitio* is always fatal to the diligence, as a proper adjudication. In very favourable cases, indeed, such as where partial payments have been made without the knowledge of the creditor, or where the debt is found to be less than what was supposed, in consequence of the subsequent decision of points of law, it is sustained as a security for the debt, without the accumulations ; but this is converting it into a right of a quite different nature, and may be regarded as one of the strongest exertions of the *nobile officium* of the Court. In cases like the present, however, where the *pluris petitio* is considerable, and where there is no plea of favour on the part of the creditor, the adjudication is always reduced *in toto*.

ARGUMENT FOR
ADJUDGER.

PLEADED FOR THE ADJUDGER. — The debt for which the adjudication was led, arose, not from any clear document by which its amount could be instantly verified, but from a fraudulent act on the part of M'Neil, which made it impracticable for the defender to give his attorney, in this country, precise information respecting the extent of the balance due to him, or to transmit any voucher for instructing it. And as other creditors of M'Neil were adjudging the fund *in medio*, the year and day must necessarily have elapsed before more accurate information could have been got from the West Indies. In this situation, the adjudging for a random sum, reserving

all defences *contra executionem*, was a measure justified by the necessity of the case ; as otherwise, the preference given to adjudications within year and day, would often amount to an absolute exclusion of just creditors residing in foreign countries.

McNEIL'S CRED-
ITORS
v.
SADDLER.
1794.

The adjudication in question was substantially one in security ; for, as it proceeded on a decree of constitution, containing a reservation of all defences *contra executionem*, it appeared, *ex facie*, to have been obtained for a debt not yet properly liquidated. The legal, therefore, could never expire, it being thus admitted, that the sum which the debtor was to pay, in order to redeem it, was to be the subject of after discussion.

When adjudications were substituted in place of appraisings, although they still bore the form of sales under redemption, they came in reality to be considered merely as securities for debt, and hence the voiding an adjudication *in toto*, on account of a *pluris petitio*, became as unnecessary as it was rigorous. If led for more than the real debt, nothing can be more simple than to reduce it, *quoad excessum*, allowing it to subsist as a security for what is justly due. Accordingly, for a long time past, the practice has been merely to restrict the adjudication to that sum, striking off penalties and accumulations.

The Lord Ordinary reported the cause, on informations.

The Court unanimously "Sustained the objections to William Saddler's adjudication ; and found, that in virtue thereof, James Saddler is not entitled to be ranked upon the subject in question."

JUDGMENT.
March 7, 1794.

OBSERVED ON THE BENCH.—"Where grounds of debt are produced, and there is not sufficient time to discuss defences stated against them, decree ought to be pronounced, reserving all objections *contra executionem*. But here the adjudication proceeded on a decree pronounced, without any evidence of the debt. In such a case, the pursuer must take care that his demand is not beyond what is justly due ; whereas, here the *pluris petitio* is perhaps the greatest that has ever occurred in this Court. Creditors taking decrees for random sums, with a view to adjudge, should always conclude for less than the real amount of their claim ; or, if they wish to take every chance, they should separate the sum clearly due to them from that for

OPINIONS.
Faculty Re-
port.

M'NEIL'S CRE-
DITORS
v.
SADDLER.
1794.

which they have only a doubtful claim, and make a distinct conclusion for each."

1. In the case of *BALFOUR v. WILKIESON*, Nov. 3, 1738, LORD KILKERRAN observes,—“Though, *stricto jure*, an adjudication being once opened is null to all effect, and no room left for the arbitrement of the Judge, it being in its nature indivisible, and as other legal diligences, either formal, or null *in toto*; yet where the defect is small, and proceeding from an innocent mistake, the Lords have by a long practice been in use, *ex equitate*, to sustain the adjudication as a security, especially where the question is only with the debtor, and not with competing creditors. And accordingly, in this case, where the adjudication was led for more than was due, and the question only with the debtor, in respect it was led by an assignee, who knew not of the payments made to his cedent, the adjudication was sustained as a security for the principal sum, annualrents, and necessary expenses at the date of the adjudication.”—*Kilkerran's Decisions*, p. 2.

2. In the ranking of the CREDITORS OF EASTER FEARN, Nov. 6, 1747, an adjudication was sustained, although the *pluris petitio* was of the grossest kind. Ross of Balnagowan founded on an adjudication, obtained by Ross of Anker-ville, against Ross of Easter Fearn.

Ross of Calrossie objected to the adjudication as null, as proceeding upon a decree of constitution, for a sum much beyond what was due, and that not obtained through oversight or mistake, but *pessima fide*, on the part of Anker-ville. The sum decerned for was £9540, and the sum due was £1284. The adjudication was sustained as a security for the sum due.

3. LORD KILKERRAN observes,—“Had the practice of the Court in former cases been followed in this, the objection must have been sustained; for hitherto, the Lords have been in use to consider adjudications to be of their nature indivisible, and therefore *stricto jure* to be either valid or null *in toto*; but nevertheless, in respect of long practice, to sustain them *ex equitate* as a security for what was truly due, especially where the question was only between the creditor and the debtor, but rarely in a competition of creditors, and only where the effect was small, and proceeded from some innocent mistake. But wherever the defect appeared to proceed from design, the Lords have been in use, in a competition of creditors, to set aside the diligence *in toto*; in so much, that where an adjudication proceeded upon different debts contained in one accumulation, because of a gross error of

pluris petitio with respect to one of the debts, the adjudication was found void *in toto*, even as to that debt, against which there lay no exception.

4. "But in this case, a very different reasoning prevailed, viz., That although, when apprisings were in use, wherein there was a value put upon the lands by the messenger, apprising behoved either to subsist or to fall *in toto*, because where there was a *pluris petitio*, there was no ascertaining, without a new jury, how much, or what part of the lands appraised should be retained by the appriser, to satisfy what might be truly due; and therefore it was necessary that the lands should be of new appraised. Yet, as in adjudications, there is no value put upon the lands, but great estates are daily adjudged for trifling sums, there was nothing in law, or the nature of the thing, why, notwithstanding of a *pluris petitio*, the adjudication should not subsist for what is truly due, as well as an infeftment of annualrent granted, for two debts would subsist for the one debt truly due, although it should afterwards appear that the other debt had been paid before the annualrent right was granted. And, upon this reasoning, the adjudication was in this case sustained as a security for the £1284 contained in the fitted account, though hardly can a case occur where less can be said to excuse the *pluris petitio*."—*Kilkeran's Decisions*, p. 17.

5. In the case of *BROWN v. GORDON*, December 16, 1760, an adjudication was objected to on

the ground that the creditor had adjudged for £463 Scots more than was due. The personal creditors **PLEADED**—Although adjudications have sometimes been sustained as securities for the sums justly due, notwithstanding a *pluris petitio*, this has only been done where the question has occurred between the creditor and the debtor himself, on the ground that he ought to have appeared and objected to the adjudication. An adjudication has also been sustained as a security, where the *pluris petitio* was innocent and excusable, and where also the effect would be to give the other creditors a preference, and to cut the adjudger entirely out of his payment. The present case, however, is different. There is no excuse for the *pluris petitio*, as it consists almost entirely in omitting to give credit for the contents of those receipts granted by the adjudger for money paid to himself. The objection, too, is insisted upon, not by the debtor himself, but by his creditors, and not with a view to deprive the adjudger entirely of his debt, but to prevent him excluding them, as the only effect of annulling the adjudication would be to bring in the personal creditors *pari passu* with the adjudger. The Lords reduced the decree of adjudication *in toto*.

6. In the case of *MACWHINNIE v. BURTON*, February 4, 1796, a *pluris petitio* proceeding from culpable negligence was found to void an adjudication *in toto*. It appeared that the creditor adjudging had adjudged for a debt of £342, without deducting the partial pay-

ments, amounting to £100, which he had previously received. The Lord Ordinary pronounced the following interlocutor:—"In respect the said Alexander Burton has not made it appear that the *pluris petitio* in his adjudication was owing to an innocent mistake, therefore sustain the said objection as sufficient to reduce his adjudication *in toto*, leaving him to rank as a personal creditor for what may be found due to him." On advising a reclaiming petition for the adjudger, the Court adhered. LORD JUSTICE-CLERK BRAXFIELD observed,—“This is no question with the common debtor, for the funds are short of the debts. In a question with the common debtor, I would go a great length to sustain, if nothing iniquitous in the case. In questions with coadjudgers a different rule is followed. The errors here are too great.” LORD ESKGROVE observed,—“Adjudication is a step of diligence. It must be regular when it competes with others. There are various articles of error here.”—MS. Notes, *Baron Hume's Session Papers*.

7. LORD PRESIDENT CAMPBELL observed,—“This is like the case of Mossman, and to be found null. At the same time I think that there may be cases where it would be proper only to annul in part, but where gross as here, I would annul *in toto*. For, although an adjudication is more of the nature of a *pignus prætorium* now than formerly, still it may be converted into a right of property, so that strictness and attention are

requisite.”—MS. Notes, *Baron Hume's Session Papers*. On his own copy of the Papers, the Lord President has written,—“Adjudication. *Pluris petitio*. A general adjudication is no doubt more of the nature of a *pignus prætorium* than a sale; but a decree of declarator of expiry, though in absence, may convert it into a property, and therefore it must not be laid down as a general rule that no *pluris petitio* ought to annul an adjudication. The conduct of the pursuer and his agent in this case was very slovenly, and even culpable.”—MS. Notes, *Sir Hay Campbell's Session Papers*.

8. “Where the creditor has adjudged for payment in a case where he ought to have adjudged only in security, his adjudication will not be available. Thus if the debt be alleged as future or contingent, he cannot adjudge for payment. If, however, the constitution has been laid for a sum, for which, though it cannot be instantly proved, the creditor takes decree, reserving all objections *contra executionem*, the adjudication will be good, provided in the ranking the debt can be supported to that extent.”—*Bell's Com.*, vol. i. p. 744. “If the accumulated sum include more than is justly due, the diligence is objectionable, on the ground of a *pluris petitio*. But the decisions of the Court have not been uniform respecting the effect to be given to a *pluris petitio*. Lord Kilkerran, in reporting the case of the creditors of Easter Fearn, gives a history of the opinions of the Court on the subject, gradually relaxing

from the rigid notions applicable to apprisings, and admitting adjudications containing *pluris petitio* as securities, unless where the *pluris petitio* was gross and fraudulent. The Court went further even than this, and found an adjudication containing a *pluris petitio* 'plainly *mala fide*, good as a security.' The doctrine seems at

last to have settled at this point, that in cases of material *pluris petitio*, or culpable neglect, the adjudication is annulled, but where it is slighter, the only effect is to reduce the adjudication to a security for principal and interest, without expenses or penalties." — *Bell's Com.*, vol. i. p. 745.

SECTION VII.

ADJUDICATION CONTRA HÆREDITATEM JACENTEM.

An Adjudication may be redeemed by an Heir served who has previously renounced.

STEWART v. LINDSAY.

Dec. 7, 1809.

NARRATIVE.

STEWART was possessed of certain subjects in the town of Dunkeld. On his death, a summons of constitution was raised by one of his creditors against his son, who gave in a renunciation to be heir to his father. The creditor then obtained a decree *cognitionis causa*, and thereafter led an adjudication *contra hæreditatem jacentem*. A charter of adjudication was obtained from the superior, and the subjects were afterwards sold to the defender.

James Stewart, the grandson of the original debtor, was served heir to his grandfather, and brought an action against the defender for exhibition of his titles, and concluding to have it declared, that the subjects were redeemed, and the debt extinguished by intromissions. The defender pleaded, that an adjudication proceeding upon a renunciation to enter heir, was not subject to redemption.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The tendency of the law has for a long time been to restrict adjudications to a security for the debt adjudged for. It is now established, that by the expiry of the legal, the property is not *ipso jure* transferred. There is no ground for pushing the effect of an adjudication *contra hæreditatem jacentem*, further than that of other adjudi-

cations. They ought rather to be less favoured, as being led against heirs who have little opportunity of forming a correct idea of the value of the subjects, compared with the burdens that affect them.

STEWART
v.
LINDSAY.
1809.

The terms of a decree of adjudication *contra hæreditatem jacentem*, are similar to those of a decree in an ordinary adjudication. The adjudger is found by the decree to have right to the lands during the not redemption thereof. The doctrine laid down by Mr. Erskine reduces the plea of the defender to a mere point of form, namely, whether the heir renouncing shall be allowed to redeem in the present process, or by the circuitous method of adjudication upon a trust-bond. This mode of operation can have no effect but to create trouble and expense. The practice of the Court gives little countenance to pleas, the effect of which is to force a party to do *per ambages* what might be done directly.

At any rate, although an heir who had renounced were precluded from redeeming, it has been found that the next heir serving is not thereby precluded. *Crawford v. Auchinleck*, January 17, 1666. This is the case of the pursuer.

PLEADED FOR THE DEFENDER.—There exists an important distinction between ordinary adjudications and adjudications *contra hæreditatem jacentem*. When an apparent heir of a deceased debtor, on being sued by a creditor, disclaims the representation, renounces the succession, and suffers decree to pass *cognitionis causa*, he thereby declares that he will have nothing to do with the lands, or the redemption of them, but gives up or renounces all interest in them to the creditor. Having thus renounced the succession of his predecessor, there is no longer any occasion or *termini habiles* for a declarator of expiry of the legal against him. He has in fact declared, that such a declarator shall not be necessary against him.

ARGUMENT FOR
DEFENDER.

A declarator of expiry of the legal against one who has renounced to be heir would be absurd, because, to make such a procedure rational and consistent, it must imply that the person called as defender had not renounced to be heir, contrary to the undoubted fact ascertained upon record, that he had renounced to be heir. The bringing of a declarator of expiry of

STEWART
v.
LINDSAY.
1809.

the legal against him, would further suppose that he was entitled to redeem the adjudication, and take possession of the estate, when by law he could have no such title, after he had in due form renounced the succession in favour of the creditor at whose instance he was charged.

If it is the privilege of an heir not renouncing, that the right of redemption should not be cut off without a decree of declarator, the heir renouncing has rejected this privilege, like every other right derived from the ancestor. If the pursuer's father had been called in an action of declarator when the legal expired, above twenty years ago, it would have been entirely useless, because, having renounced, he could have proponed nothing.

Interlocutor of
Lord Ordinary,
Feb. 29, 1809.

LORD GLENLEE, Ordinary, "Repelled the plea which the defender has stated on the ground of the adjudication proceeding on the pursuer's father's renunciation to be heir : Finds, that the circumstances alleged by the defender are not relevant to make the expiry of the legal operate in this case, without a declaration thereof ; and on the whole matter, Ordains the defender to give in a state of the debt due under the adjudication, and of his and his author's intromissions with the subjects, and disbursements thereon."

JUDGMENT.
Dec. 7, 1809.

The Court unanimously adhered to the Lord Ordinary's interlocutor, "In so far as it repelled the plea of the defender stated on the ground of the adjudication proceeding on a renunciation to enter heir, but remitted to the Lord Ordinary to receive a condescendence from the pursuer of the value of the subject in dispute, at the date of the adjudication, and of the debts affecting the same, and to proceed accordingly."

MS. Notes,
Lord Meadowbank's Session
Papers.

On the Session Papers in the cause, LORD MEADOWBANK, senior, has written,—"*Adjudication contra hereditatem jacentem*, subject to redemption, like any other adjudication."

1. "The charge to enter heir is two kinds, a general charge, and a founded upon the Act of Parliament 1540, cap. 106, and it is of special charge. The general charge to enter heir proceedeth thus:—

The creditor, upon supplication, without citation, obtaineth from the Lords, of course, letters passing under the Signet, to charge the party complained upon to enter heir to the complainer's defunct debtor, within forty days after the execution of the charge, with certification, if he enter not, such process will be granted against him as if he were actually entered heir. The reason of this charge with us is, because heirs are not liable *passivè*, if they enter not, nor immix themselves in the heritage; and therefore, that the creditor may not lie out beyond the year and day granted to heirs to deliberate, the law hath introduced this remedy, that the creditor may charge the debtor's apparent heir to enter, whereupon he hath personal action against him, if he renounce not, and thereupon may reach not only his heritage, but his own proper goods belonging to him *aliunde*; and if he renounce, he hath action *contra hæreditatem jacentem*."—*Stair*, 3, 5, 22.

2. "A special charge to enter heir differeth from the general charge in this, that the general charge is in lieu of the general service, for thereby the creditor reacheth the person of the apparent heir of his debtor, and his estate or goods established in his person, unless he renounce. And so the general charge is the ground of a process and decret for payment, but thereby the creditor cannot reach the lands and annualrents, which are not as yet established in the person of the apparent heir, he not being spe-

cially served thereunto, or infest therein; and therefore, that the creditor may reach these, he must use a special charge, which supplieth the special service and entry.

3. "This special charge, though it proceedeth upon supplication without citation, yet it must be upon production of a decret at the creditor's instance, not *cognitionis causa*, but for performance. And it is competent in two cases; first, upon the proper debt of the party to be charged, for if the debtor be unentered to some of his predecessors, and so their rights not established in his person, in that case the creditor must charge his own debtor specially to enter heir in the rights competent to him by that predecessor, with certification, if he enter not, the creditor shall have such process and execution against that land and heritage to which he might enter, as if he were actually entered therein, whereupon apprising doth proceed. In this case, there is no necessity of an antecedent general charge, which only is used to the effect that the debt may be established against the person of the debtor's apparent heir *passivè*, by a decret upon the general charge. The other case is, when the debt is not the proper debt of the party charged, but of some predecessor to whom he may be heir, in which case the debt must first be established against him *passivè*, and then followeth the special charge. In this case, the special charge cannot be till after year and day, because it presupposeth not only the summons, but also the sentence

upon the general charge, which both must be after year and day. The remedy against both charges to be heir, is a renunciation to be heir, whereby the renouncer's person and his proper estate will not be liable for his predecessor's debts, but only his predecessor's heritage."—*Stair*, 3, 5, 23, 24.

4. "Adjudication upon the apparent heir's renouncing to be heir, proceedeth upon these ways. If he be pursued as lawfully charged to enter heir, for satisfying of his predecessor's debt or obligation, he may renounce to be heir, if he have not meddled, either in the process against him, as charged to enter heir in the first instance, or some time thereafter, by suspension or reduction. If he renounce in the first instance, when the debt is not yet instructed and established, as when it proceeds not upon a clear bond or writ, but abides probation by witnesses, or otherwise, then before the process of adjudication, there must be a process and sentence against the heir renouncing, *cognitionis causa*, for establishing and proving the debt; in which, because there is a necessity in all processes to have a defender, the apparent heir renouncing is only called to supply that place, *cognitionis causa*, but without any effect against him, but only *contra hereditatem jacentem*.

5. "But if the apparent heir renounce in the second instance, after decret obtained against him, or, in the first instance, when the ground and title of the pursuit instructs the debt, then there needs

no other decret *cognitionis causa*, but the pursuer protesting for adjudication, the same will be admitted summarily. Adjudication itself is a most simple and summary process, whereby the heir renouncing, and the debt being established, as said is, the whole heritage renounced, or benefit whereto the heir might succeed, is adjudged by the Lords to the pursuer for satisfaction of the defunct's obligation, wherein the heir renouncing, is again called to sustain the part of a defender, which is only for form's sake, for he can propone nothing."—*Stair*, 3, 2, 46.

6. "Lands may be appraised not only by the original creditor, but by any person who shall, either as assignee, or as heir to him, have the right to the debt established in himself; and, on the other hand, whoever stands in the right of a debt, may lead an apprising of his debtor's lands, not only in the debtor's lifetime, but after his decease. For the better understanding this head of our law, the doctrine of succession must be anticipated, so far as to explain the general properties of a service or entry as heir, and of charges given to the heir to enter."—*Erskine*, 2, 12, 11.

7. "Services are intended to give to the heir an active title, or a proper right to the heritable estate belonging to his ancestor. A general service establishes in him who enters heir, the right of such part of the heritage of the deceased, as either requires no seisin, or in which the deceased was not actually seized; and a special service carries the right of those heritable

subjects in which the ancestor died vest and seized. Though the two before mentioned Statutes, authorizing the apprising of lands after the debtor's death, upon a charge used against the heir to enter, do not distinguish between a general and a special charge to enter, our uniform practice has been careful not to confound the one with the other. A special charge fully supplies the want of a service; it states the heir, *fictione juris*, in the right of the subjects to which he is charged to enter, and consequently makes those subjects liable to the same execution at the suit of the creditor, as if the heir had entered to them, and been infeft upon his service. A general charge is, on the other hand, intended barely for fixing the representation of the heir, or subjecting him to that debt which was formerly due by the ancestor; but it does not establish in him the right of such heritable subjects as are carried by a general service, so as they may be affected by the creditor's diligence."—*Erskine*, 2, 12, 12.

8. "When, therefore, the debt is due by the ancestor, it imports the creditor to know, in the first place, whether the heir is to represent his ancestor, and so subject himself to the debt; for which purpose he must give him a general charge to enter to his ancestor the debtor. If the heir fail to give obedience to the charge within the time specified in the letters, the creditor may bring an action of constitution against him; in which, if the heir do not renounce the succession, decree passes of course,

subjecting him to the debt, as lawfully charged to enter heir to his ancestor, which constitutes the debt against him *passive*. It still remains that the heritable rights belonging to his ancestor be vested in him, so as they may be subjected to the creditor's diligence. For this purpose, if they are rights in which the ancestor died infeft, the heir must be charged to enter in special to them; and if the deceased's right was personal, not perfected by seisin, and therefore to be carried by a general service, then what our lawyers distinguish by the name of a *general-special* charge, must be given to the heir. This kind of charge has the name of *special*, not only because it is directed against subjects specially contained in the letters of charge, but because it hath the vesting effect of a proper special charge; and it is called *general*, because it relates to such subjects alone as a general service can carry. As this charge, whether special or general-special, is made equivalent to the heir's actual entry, by the Statute 1540, an apprising led by the creditor, after the days of the charge are expired, effectually carries to him the subjects to which the heir was charged to enter."—*Erskine*, 2, 12, 13.

9. "Where the apparent heir, and not the ancestor, is the debtor, there is no occasion for giving him a charge to enter in general. It imports nothing to the creditor, whether the debtor shall, or shall not, subject himself to the debts of the ancestor. His only concern is, that titles be completed by the

debtor to the heritable subjects which belonged to his ancestor. In order to this, letters must be raised and executed at his suit, against the heir, either of special or of general-special charge, according to the different natures of the subjects to be affected by the creditor in the manner now explained. After the elapsing of the days of this charge, the subjects contained in it are as effectually carried to the creditor by his decree of apprising, in consequence of the Statute 1621, as if the heir had actually entered to them."—*Erskine*, 2, 12, 14.

10. "The general and special adjudications were substituted by the Act 1672, in the place of apprisings; but there are two other kinds of adjudication, which were received in our old law at the same time with apprisings, viz., adjudications on a decree *cognitionis causa*, otherwise called *contra hæreditatem jacentem*, and adjudications in implement. As to the first, the method prescribed by 1540, c. 106, to creditors, for attaching the heritage of their deceased debtors, by charging the apparent heir to enter to his ancestor, first in general, and then in special, and upon his failure to apprise the lands, has been explained above. But where the debtor's apparent heir, after being charged in general, renounces all benefit which might accrue to him by the succession, he cannot with propriety be charged to enter heir in special to an estate which he has already renounced; nor did the Act 1540 make any provision how

the right of the lands belonging to the deceased debtor might in that case be carried to the creditor.

11. "This defect was supplied by the following expedient, which being introduced by necessity, was approved of by our Judges without a Statute. Though the heir renouncing could not be subjected to the payment of his ancestor's debts, the creditor was allowed to summon him for form's sake, in a suit for proving the debt due by the deceased, in consequence of which a decree was recovered, not against the defender, who was absolved from the suit in respect of his renunciation, but against the *hæreditas jacentis* of the deceased, which was thereby subjected to the creditor's diligence. This decree got the name of *cognitionis causa*, because it was intended for the single purpose of declaring or cognoscing the extent of the debt due by the deceased, that adjudication might proceed upon it against the lands.

12. "By the old practice, the creditor, where the debt was liquid, protested for adjudication in the process of cognition; and a decree of adjudication was granted summarily in consequence of the protestation, but now adjudication cannot pass without a previous summons for that purpose. The creditor, however, sometimes inserts a conclusion of adjudication in his summons of constitution following upon the general charge, in case the heir shall in that process renounce the succession; and a decree of adjudication proceed-

ing on that alternative in the summons, is effectual to the creditor. This diligence, grounded on the renunciation of the heir, was styled, not an apprising, which was an appellation proper to the decrees pronounced by messengers on the appreciation of an inquest, but an adjudication, because it was a sentence of the Court of Session, or other Judge Ordinary, adjudging the *hæreditas jacens* of the debtor deceased, to the creditor pursuer."—*Erskine*, 2, 12, 47.

13. It is now no longer competent to use letters of general charge or special charge, or general-special charge. In an action of constitution of an ancestor's debt or obligation against his unentered heir, the citation on and execution of the summons in the action is held to imply and be equivalent to a general charge, the induciæ of which expire with the induciæ of the summons, and the like certification is inferred as in a general charge. It is thereafter competent to adopt under such summons the same procedure, in all respects, and to pronounce the same decree, which would have been competent had the summons been preceded by letters of general charge duly executed against the heir according to the former practice.—*Vict.*, 10 and 11, *cap.* 48.

14. In an action of adjudication against an unentered heir following on such decree of constitution, or in an action of adjudication against an unentered heir founded on his own debt or obligation, the execution of the summons of adjudication is held to

imply, and be equivalent to a special charge or general-special charge, as the circumstances of the case may require, and the decree pronounced is held to be as valid as if the summons had been preceded by letters of special charge or general-special charge duly executed against the heir, according to the former practice. In an action of constitution and adjudication combined in the same summons against an unentered heir, the same decree may be pronounced, which would have been competent had the summons been preceded by letters of general charge; and in such action, it is competent to pronounce decree of constitution and adjudication in the same interlocutor, and to extract both in the same extract.—*Vict.*, 10 and 11, *cap.* 48.

15. With regard to the power of an heir who has renounced to serve afterwards and redeem an adjudication, LORD STAIR observes,—“Craig observeth, that it was doubtful in his time, whether there was a legal reversion competent to any renouncing, and afterward returning to redeem adjudications as apprisings, wherein he favoureth the affirmative. But the said Statute 1621, c. 7, determineth the case, and granted a legal reversion in favour of those who have posterior adjudications, within the space of seven years from the date of the decreet of adjudication, or ten years since the Act 1661, betwixt debtor and creditor, which is also competent to any renouncing in their minority, and being restored against the said renunciation, but it is not

competent to any other heir renouncing. Yet, if the heir, though major, find that he hath prejudged himself, by renouncing a profitable heritage, he may grant a bond, and thereupon cause, within the legal, adjudge and redeem the former adjudications, which, though to his own behoof, will be effectual, there being so much equity and favour upon his part, being willing to satisfy the whole debts."—*Stair*, 3, 2, 50.

16. In the case of *MACAULAY v. COUSTOUN and GUILL*, January 27, 1680, reported by Lord Stair, a son as representing his father being sued for payment of his father's debt, as charged to enter heir to him, he renounced to be heir, and was assoilzied. The creditor then obtained adjudication, *contra hæreditatem jacentem*. The son thereafter entered heir to his father, and assigned his right to a third party, and they jointly pursued a reduction of the adjudication, and offered to satisfy the debt. The creditor pleaded, that the son having once renounced to be heir, had no recourse against that party to whom he had renounced, nor any reversion of his adjudication, which was competent to other creditors adjudging, but not to the heirs assigning. The Lords found, that the heir having renounced or assigned, he had no reversion or recourse to satisfy the adjudication."—*Stair's Decisions*, vol. ii. p. 749.

17. The case of *MACAULAY* is referred to by Mr. Erskine, in support of the view, that heirs renouncing are not entitled to re-

deem. He adds, however, "Yet custom hath established an indirect method, by which majors also may redeem after renunciation, viz., by granting a trust bond for a sum amounting to the full value of the ancestor's estate, upon which the trustee charges the heir who grants it, to enter in special, and afterwards adjudges in common form. The conveyance of this adjudication in favour of the heir, entitles him not only to redeem prior adjudication, but also to set them aside upon nullities, or to prove that they had been satisfied by intromissions. But the using of such conveyance subjects the heir to a passive title."—*Erskine*, 2, 12, 49.

18. The question has been sometimes raised, Whether an heir can renounce, who is charged to enter in special at the instance of his own creditor? Professor Bell observes, "In the case of an heir succeeding to one, whose debts expose the estate to the diligence of his creditors, the heir may wish to renounce the succession, and not to undertake even that implied and legal responsibility, which the statute has declared to be the result of disobeying a special charge. But there is a manifest objection to such renunciation by a debtor who has succeeded to a valuable estate. Between the case of an heir who is required to enter upon the succession of his ancestor, in order to facilitate the payment of that ancestor's creditors, and the case now under consideration, there is a marked distinction. No man can be forced to undertake.

for the benefit of those to whom he owes no duty, a succession which implies burdens, but a person who is owing debts cannot renounce a succession which has opened to him, and which may supply the means of paying his debts, without unjustly bestowing upon the next heir property to which his own creditors are entitled. Another main distinction between the cases is this, that the creditors of the ancestor are not deprived of his estate by the refusal of the heir to enter, although compliance might have facilitated their operations; for, by law, they are entitled, in that case, to proceed directly against the *hæreditas jacens*, or unvested property itself, as coming in place of their debtor; whereas the creditors of the heir can attach the succession only through the person of their debtor. A renunciation, in the former case, is therefore of little consequence; in the latter, it deprives the creditors of the fund which ought to be open to them."—*Bell's Com.*, vol. i. p. 710.

19. The question stated by Professor Bell was raised in the case of the LAIRD OF CARSE v. HIS BROTHER, reported by Durie, March 23, 1627. The Laird of Carse was indebted to his brother. The brother charged him to enter heir to his father in certain lands in which his father died infest, in order that he might comprise these lands in payment of his debt. The charge to enter heir was suspended by the elder brother, on the ground that he offered to renounce to be heir to his father. The younger

brother contended, that he could not renounce, seeing that by his renunciation he would not be freed from the debt, the debt being his own debt, and that he could not therefore be bound to renounce where the same could not avail him, but that he might comprise against him, as lawfully charged to enter heir. Durie observes,—“The Lords found,—That he might lawfully renounce to be heir, after which the creditor might seek adjudication of the same lands, which being the ordinary remeid of law competent after the said renunciation, it would prove as profitable as a comprising deduced against the party lawfully charged to enter heir to his father in these lands, from the which he renouncing to be heir, nothing was alleged that might hinder the party charged to renounce, as said is. But because this process seemed to be deduced by collusion between the two brothers, the Lords declare, that whatsoever should be here done, should noways prejudice any other.”—*Brown's Supp.*, vol. i. p. 45.

20. The right of an heir to renounce, and at the same time the right of a creditor of the heir to lead an adjudication *contra hæreditatem jacentem* of the ancestor, are both recognised by Lord Stair. He observes,—“It is clear by the said Statute, the lands or heritage of a defunct may be adjudged, the heir renouncing, not only for satisfaction of the defunct's debt, but of the heir's own proper debt.”—*Stair*, 3, 2, 51.

21. The principle for allowing an heir to renounce when

charged to enter at the instance of his own creditor, may be, that were he not to renounce, and so allow his ancestor's estate to be adjudged for his own debt, he might thereby incur a passive title, and so become liable for his ancestor's debts. Erskine observes,—“ The heir's renunciation will not be received, if he have already behaved as heir, or have, by incurring any other passive title, done something inconsistent with renunciation, or if the ancestor's estate is adjudged for the heir's proper debt ; in which last case, the heir must clear off that debt before his adjudication be admitted, for his allowing adjudication to be led on his own debt, against his ancestor's estate, is justly deemed immixtion, as it diminishes the creditor's fund of payment, by applying part of it to extinguish an obligation properly due by himself.”—*Erskine*, 3, 8, 93.

An Adjudication contra hæreditatem jacentem carries the rents accruing since the death of the party last infeft.

CORSER v. DURIE.

Dec. 19, 1638. **WILLIAM DURIE** of Newton was debtor by bond to Robert Corser in Dysart. On Durie's death, Corser pursues his son, Andrew Durie, for payment of the bond, as *gerens se pro hærede* to his father.

July 21, 1636. **Durie's Decisions**, p. 820. The Court found, That the son had not made himself liable for his father's debts.

Corser then charged Andrew Durie to enter heir to his father ; and on his renouncing to be heir, he brought an action of adjudication against him, for adjudging the right to the lands of Newton, which formerly belonged to his father, and of which he was in possession at the time of his death. He further concluded in the adjudication, that the defender should be decerned to pay the maills and duties of the lands intromitted with by him since his father's death.

ARGUMENT FOR DEFENDER. **PLEADED FOR THE DEFENDER.**—The present process ought not to be sustained, being against the practice used in the like cases. The pursuer ought first to pursue to have his debtor's right adjudged. When the right is adjudged, he may then

competently pursue for the maills and duties thereof; but to pursue for the same because he has the right established in his person, and before it has been tried if the right be of that nature which might produce an action for the duties of the lands, is incompetent. Adjudication is a process for executing a sentence, and resembles on this point a comprising. The intenting of a process of comprising or denouncing to pursue before the comprising, could never be a ground to pursue for maills and duties. No more in a process of adjudication can maills be claimed before the sentence of adjudication has been pronounced.

CORSER
v.
DURIE.
1638.

The Lords “Repelled the allegiance, and found the process may be sustained both to crave the right of the lands to be adjudged in one summons, and the profits decerned also.”

JUDGMENT.
Dec. 19, 1638.

1. The case of *CORSER v. DURIE* implies, that rents accruing prior to a decree of adjudication *contra hæreditatem jacentem*, may be carried by it contrary to what is the rule in other forms of adjudication. And it is referred to by Lord Stair in support of that proposition. Lord Stair observes,—“In adjudications upon the apparent heir renouncing to be heir, all is competent to be adjudged which should have befallen the heir entering, as lands, annualrents, reversions, tacks, liferents, and all heritable bonds; yea, not only these rights themselves, but the bygone rents and duties thereof, preceding the adjudication, and after the defunct’s death, may be adjudged and pursued against the possessors and intromitters in that same pro-

cess, because these are competent to the heir renouncing, and there is no other way to attain them, as was found in the case *Corser v. Durie*, Dec. 19, 1638. And likewise heirship moveables, for the same reason, are competent in adjudications, but not against other moveables of the defunct, which must be confirmed.”—*Stair*, 3, 2, 48.

2. A different rule holds with regard to arrears in adjudications against an heir on a special charge. The same rule, however, was applied by the Court in the case of *DOOLY v. DICKSON*, February 13, 1740. That case is thus reported by Lord Kames in the *Folio Dictionary*:—“An adjudication on a special charge, carries bygones from the death of the predecessor

who was last infest in the same way as they are carried by an adjudication *cognitionis causa*, and for the same reason, *i. e.*, because there is no other method invented in law for carrying bygones in these cases." Lord Elchies dissented from this judgment. In his Decisions, he observes,—“Adjudications on a special charge of an heritable bond, found to carry not only the principal sum and annualrents from the date of the adjudication, but even the bygone annualrents from the death of the predecessor. There is no doubt that adjudications on a general charge and decreet *cognitionis causa* do so. But some of the Lords doubted much, whether an adjudication on a special charge, which has only come in the place of apprisings, has the same effect. But the Court found that it had." In the notes to his Decisions, Lord Elchies observes,—“Killbucho having upon a general charge obtained a decreet of constitution on a charge to enter heir, and upon a special charge adjudged an heritable bond, the question was, Whether this adjudication carried the annualrents *retro* from the predecessor's death? I thought not, because before 1672 the diligence behoved to have been by apprising, which could not reach bygones. However, all the rest found that the adjudication carried these bygones.”—*Elchies' Decisions*, vol. ii. p. 8.

3. Lord Kilkerran in his Decisions, observes on this case,—“The Lords differed upon the

question, Whether an adjudication upon a special charge carried bygone rents due between the predecessor's death and the date of the adjudication. It was by several of the Lords thought, that though an adjudication upon a *cognitionis causa* did carry such bygones, as affecting the *hereditas jacens*, and carrying everything which would have been carried by the heir's service; yet, where the adjudication proceeded upon a constitution and special charge, it carried only right to the particular subject adjudged; and, of course, to the maills and duties from its date. That such only was the effect of comprisings before the Act 1672; and the case must be the same of adjudications, which are come in place thereof. That there is no difference in this respect between an adjudication on a special charge on the apparent heir's proper debt, and where it is on the predecessor's debt; for, wherever a constitution is obtained, the debt becomes the proper debt of the apparent heir, and it would be singular, that an adjudication for the proper debt of the apparent heir should carry bygones due prior to its date.

4. “Notwithstanding, the contrary opinion prevailed; and it was found,—‘That the adjudication on a constitution and special charge, carried the bygones since the death of the predecessor.’ There appeared to be no *habile* method of affecting such bygones, but by adjudication; wherefore, though a comprising before the 1672 might not carry

bygones, but that an extraordinary adjudication was necessary to carry these, yet now, that adjudications are come in place of comprisings, it was thought that no more was necessary than one adjudication to carry both the land and bygones." —*Kilkerran's Decisions*, p. 4.

5. The opinion of the majority of the Court is thus stated by Lord Kilkerran, on his Session Papers,—"On the other hand, it was said by others that a special charge did by a fiction in law supply a service and infetment upon it, and as a service did *retro* operate to the death of the predecessor, and carried everything in *hæreditate jacente*, so an adjudication on a special charge was equal to a disposition by an heir served to everything that fell under his service, and for that reason it was said to be erroneously assumed that even an apprising before 1672 would not have had the same effect. But, *separatim*, though it should be supposed that an apprising would not have had that effect, it was said not to follow that an adjudication will not now have it, for if an apprising were supposed not to have had that effect, then it might be said that before 1672 there was an extraordinary adjudication necessary to carry the bygones from the predecessor's death to the date of the apprising, and, if so, whereof there is no instance, because it is believed the apprising itself was sufficient for that effect, then now that adjudications are come in place of apprisings, there is no farther necessity that an adjudication should

not carry both the land and bygones from the death of the predecessor. And, indeed, wherever a subject is not otherwise affectable, an adjudication might be the method, and such was said to be the case of bygones fallen due since the predecessor's death before the date of the adjudication, especially where, as in the present case, the apparent heir had never been in possession. When the apparent heir has been in possession, it is held that upon his death the bygones unuplifted by him may be confirmed by his creditors. Are they not, *ergo*, arrestable in his life? And this was what was pointed at in the reasoning by those who opposed the decision here given, that the bygones falling due after the predecessor's death were arrestable for the debt of the apparent heir, which, if true, is a strong argument against the decision."—*MS. Notes, Kilkerran's Session Papers*.

6. The first interlocutor of the Lord Ordinary, in the case of *Dooly v. Dickson*, found,—“That the decreets of adjudication did likewise carry rights to the annual-rents, which became due from the death of the original creditor to the dates of the decreets of adjudication.” The second interlocutor, pronounced on a representation, bore,—“That though the annual-rents on the heritable bond, after the death of the original creditor, should not be carried by the adjudication proceeding upon a special charge, yet the adjudication being thereafter conveyed to and now in the person of the apparent heir to

whom the said annualrents do belong. Therefore refuses the representation, and adheres to the former interlocutor." To this interlocutor the Court adhered, February 13, 1740. On the Session Paper, Lord Kilkerran writes,— "The Lords adhered. This was not upon the specialty mentioned in the interlocutor, that the adjudication was now conveyed to and was in the person of the apparent heir, for that would have made no odds, but upon the general ground that an adjudication carries all bygones accruing from and after the death of the predecessor."—*MS. Notes, Kilkerran's Session Papers.*

7. The judgment in the case of *DOOLY v. DICKSON* was altered by the Court in the case of *ANDERSON v. STRUAN*, July 23, 1760. In this case, LORD MONBODDO observes,— "The Lords were all of opinion that an adjudication against an apparent heir upon a charge, whether of lands or of heritable bonds, carries only the rents from the date of the adjudication; contrary to what was decided in the case of *Kilbucho*, 1740, which the Lords all agreed was a bad decision. In such a case, where the heir behaves as heir, and intromits, the rents belong to him, and must be affected for his debt by arrestment; but in the case of his renouncing to be heir, and an adjudication thereupon *cognitionis causa*, the heir has no right to the rents, and the adjudication vests the estate in the creditor from the time of the defunct's

death, and consequently, he takes the immediate rents by virtue of his adjudication."—*Brown's Supp.*, vol. v. p. 878.

8. Erskine observes,— "Though no adjudication can, in the common case, carry any rents due out of the subject adjudged previously to the date of the decree, yet in the special case of adjudications *contra hæreditatem jacentem*, such rents may be adjudged. Put the case, that a debtor dies to whom some past rents were due by the tenants, and that after his death the tenants have run into a farther arrear of rent, it must be admitted that the rents which were fallen due before the debtor's death cannot be carried by adjudication, because they were separate from his heritable estate before his death, and so descended to his executors as a moveable subject which was in *bonis defuncti*; but the rents incurred after his death cannot be said to have belonged to him, since they did not even exist at his death, and are truly a rent grown out of his heritable estate since his death, which for that reason would have accrued to his heir, if he had entered. As, therefore, by the heir's renunciation of the debtor's succession, the adjudger comes in the heir's place, these rents must, *necessitate juris*, be carried by the creditor's adjudication against the *hæreditas jacens*, though fallen due previously to the date of it, there being no other method known in law by which they may be affected by diligence. This rule does not, in the opinion

of some lawyers, extend to an adjudication led upon a special charge against the heir, because that kind of adjudication proceeds on a *fictio juris*, holding the heir as entered, and therefore ought to carry none of the rents fallen due before the decree, more than it could have done if it had proceeded on the heir's actual entry. Yet the con-

trary was decided, which seems to have proceeded on this ground, That there was no other way for the creditor to come at these rents, if the apparent heir abstained from the possession, which has been thought reason enough for establishing this rule in adjudications *contra hæreditatem jacentem*."—*Erskine*, 2, 12, 48.

SECTION VIII.

DECLARATORY ADJUDICATION.

Land conveyed to Trustees without mention of Heirs, or where, being mentioned, the Heirs refuse to make up a title, and denude, will be effectually conveyed to the Beneficiary under the Trust by a Declaratory Adjudication.

I.—MENZIES v. MENZIES.

July 12, 1786.

NARRATIVE.

IN 1707, John Mackenzie of Logie assigned the sum of £555 to Mr. John Mackenzie of Delvine, and to his nephew, Mr. Kenneth Mackenzie, in trust, that they might therewith purchase land in Scotland, the rents and profits of which should be for the sole use of the truster's eldest brother, Dr. Alexander Mackenzie, during his life; and after his death, the land should belong to the truster's nephew, Murdoch Mackenzie, and the heirs-male of his body; whom failing, to his brother, George Mackenzie, and the heirs-male of his body.

The deed farther provided that it should not be in the power of Murdoch and George Mackenzie to sell the land, and carry the money to England; and that failing heirs of George Mackenzie, the lands should belong to the heirs-male of the truster's brother, Mr. Alexander Mackenzie; and failing heirs of his body, it should belong to the truster's other nearest heirs-male; and failing these, to his heirs and assignees whatsoever. The deed farther provided, that until land was purchased, the annual rent of the money should belong to the persons to whom the land and the profits thereof were destined by the deed, and in the same order successively.

After the truster's death, his nephew, Kenneth Mackenzie,

did not accept of the trust, so it devolved entirely upon Mr. John Mackenzie of Delvine. Not finding an opportunity to employ the money profitably upon land, Mr. Mackenzie of Delvine secured it by infestment upon the estate of Sir Alexander Macdonald. The infestment was taken in Mr. Mackenzie's own name, but bearing expressly that the money should be paid to him, in name and on account of Murdoch Mackenzie, the beneficiary first named in the deed. Murdoch Mackenzie was still alive, but had no heirs of his body; his brother George, the second beneficiary, was dead without issue. The third and last beneficiary by the deed was Donald Mackenzie, grandson to Alexander Mackenzie, the brother of the truster. Murdoch Mackenzie having assigned the money to the said Donald Mackenzie, the latter insisted for payment from Sir Alexander Macdonald. Sir Alexander was willing to make payment to the person who should have right to uplift the sum and exoner him, and disburden his estate of the infestment. But a difficulty arising as to who had the right, and how his estate could be disburdened, Sir Alexander raised a multiplepinding against all the parties concerned, viz., the said Murdoch and Donald Mackenzie, and the heirs of Mackenzie of Delvine, the trustee. Murdoch and Donald Mackenzie also raised a declarator of their right to the money, and of the power of Donald Mackenzie to exoner and discharge Sir Alexander Macdonald. These processes were conjoined; and in respect that the eldest son and heir of Mackenzie of Delvine, the trustee, was under a legal incapacity of serving heir to his father, in respect of an attainder, the Officers of State were likewise called.

Sir Alexander Macdonald, who had no interest in the matter except for his own security, objected, that there was no person with a title sufficient to disburden his lands of the infestment.

PLEADED FOR THE BENEFICIARIES.—By the original disposition there is a trust given to Mackenzie of Delvine, for behoof of Murdoch Mackenzie, and the substitutes therein mentioned. But the trust is not given to the heirs of Mackenzie of Delvine, for there is no mention of them. A right of property given to a man without mentioning his heirs, may in law imply a right to his heirs upon his failure. That does not, however, hold in

MENZIES
v.
MENZIES.
1786.

ARGUMENT FOR
THE BENEFICI-
ARIES.

MENZIES
v.
MENZIES.
1736.

a trust right which is personal. Where such trust, therefore, expires by the death of the trustee, it does not devolve upon his heir, but the person for whom the trust is made comes to have the absolute right to the subject. And if the trust-subject happen to be an infeftment, there is no way competent to extinguish the trust-right but by declarator in favour of the person for whom the trust is, declaring the right to be his, and declaring the lands to be disburdened upon payment made to him, and upon his granting a discharge and renunciation. In the ordinary case there might be an adjudication against the heir, but in the present case such an adjudication would make the matter neither better nor worse. Because if the trust-right did not go to the heir, the adjudication would carry nothing, and so is an empty form.

But whatever may be done for form's sake in an ordinary case, it seems certain that an adjudication in the present case would not be good for anything ; because the heir of Mr. Mackenzie of Delvine is incapable to be served in respect of his attainer. At the same time the trust-right is not forfeited by his attainer, because being a mere trust-right he could not forfeit it, it does not, therefore, devolve to the Crown. If, therefore, the son of Mackenzie of Delvine cannot be served heir, neither can he be effectually charged to enter heir. No man can be charged to enter heir who is incapable of being served heir. An adjudication on a charge can carry no more than the heir could take by his service, and therefore an adjudication against an heir incapable of being served can carry nothing. Where a subject is forfeited, but under its burdens of debt, an adjudication against the Officers of State would do. But where the subject is not forfeited or forfeitable, and so is not in the Crown, such an adjudication is good for nothing.

This being the state of the case, it seems plain that there is nothing necessary to carry the right but the declarator now insisted in, and that it cannot be carried in any other way. The declarator now insisted in enables Murdoch Mackenzie, the institute in the trust-deed, and Donald Mackenzie, the surviving substitute, and who is also the assignee of Murdoch, to discharge the money, and to renounce the infeftment in the same way as if their own names had been inserted in it in place

of the name of Mackenzie of Delvine, the trustee. Their discharge and renunciation upon payment, with a decree of the Court, declaring the infestment extinct upon such payment, will be a full exoneration to Sir Alexander, the debtor, and will effectually disburden his lands of the infestment. Nor does there appear any other possible way in which it can be done.

As regards the successors of Mackenzie of Delvine, who are not his heirs of line, but succeed to his other estate, whether personal or heritable, their interest is no farther than that they, in so far as they represent the trustee, may be exonerated of all claim on account of the trust. But a decree of the Court, finding that the sum belongs to Murdoch and Donald Mackenzie, and that the heirs of Mackenzie of Delvine have no farther interest in the same, will be a full exoneration to all the successors of Mackenzie of Delvine.

The questions then to be determined are, *First*, Whether Murdoch Mackenzie and Donald, his assignee, have full power, jointly and severally, to uplift the money and to exoner and discharge Sir Alexander Macdonald? *Second*, Whether in the circumstances of the case, a declarator of the right of Murdoch and Donald Mackenzie, and a declarator of the extinction of the infestment in Sir Alexander Macdonald's lands, and of the same being disburdened upon their discharge and renunciation, will not be an effectual extinction of the infestment and exoneration to Sir Alexander? And, *Third*, If the same declarator, with or without a discharge from Murdoch or Donald Mackenzie to the heirs of Mackenzie of Delvine, will not fully exoner them of the trust constituted in the person of Mackenzie of Delvine.

The pleading containing the above questions were submitted to the judgment of the Court in a joint Information, signed by separate counsel for Murdoch the beneficiary, and Donald Mackenzie, for the representatives of Mackenzie of Delvine the trustee, and for Sir Alexander Macdonald, the debtor in the bond, respectively.

The Lords, on the report of LORD NEWHALL, " Found, that the trust-infestment was by the attainder of the heir of the truster in the Crown, in trust for the use and behoof of the disponent, and that he might insist for denuding the Crown of the

MENZIES
v.
MENZIES.
1786.

JUDGMENT.
July 12, 1786.

MEENZIES said trust-infektment, and remitted the cause to the Lord Ordinary, to hear him thereupon, with power to determine or report."
MEENZIES.
 1786.

II.—DALZIEL v. HENDERSON AND DALZIEL.

March 11, 1756. The Earl of Carnwath, the father of the pursuer, granted
NARRATIVE. an heritable bond for £2500 to Mr. Stewart of Shambelly. By the contract of marriage between the Earl and Mrs. Margaret Vincent, certain sums belonging to the latter were vested in trustees, and the survivors or survivor of them, and the heirs and assignees of the last survivor, for the uses mentioned in the contract. One of the purposes of the trust was, that the sums vested in the trustees should in part be applied to purchasing for behoof of the children of the marriage the said heritable bond. The debt due under the bond was accordingly paid by the trustees, and a conveyance of the bond was taken to the trustees for behoof of the children of the marriage, and upon this conveyance they were infeft.

The remainder of the sums vested in the trustees were applied to paying the Earl's personal debts, who having died without giving any security, the defender, Alexander Dalziel, his eldest son by a former marriage, granted an heritable bond for the sums advanced in payment of the personal debts; and upon this bond the trustees were also infeft.

John Henderson, younger of Broadholm, was the last survivor of the trustees, and he also died, leaving one infant child, a son. The pursuer being the only child of the marriage, brought an action against the heir of the truster, and also against the superior of the lands, in order that the trust-subjects might be vested in his person.

There was no contradictor to the action, as the defenders did not appear; and the cause on coming before the Court, was delayed for a full Bench, in order that a rule might be laid down to regulate all cases of the like nature in time coming, with the least expense to the parties concerned.

Kames'
Select Deci-
sions, p. 148.

The reasoning on the point is thus given by Lord Kames, in

his Select Decisions :—" In this view, the matter was put off for a short time, in order that the Judges might prepare themselves upon it ; and when the cause was again taken up, the reasoning was as follows—By the common law of Scotland, a superior is not bound to change his vassal, and, therefore, is under no obligation to accept of a resignation *in favorem*. A trust-right is an exception ; for the very granting of infeftment, as one for behoof of another, infers, that when the truster chooses to resume his own subject, and take it in his own name, the superior must accept of him for his vassal, as he was formerly. For that reason, when the trustee denudes of a trust-right in favour of the truster, the superior, if he refuse to grant infeftment, may be charged with horning to that effect. *2do*, If a trustee, contrary to his duty, refuse to denude, an action is undoubtedly competent to the truster to oblige him. The Court will decern him to denude. This decree coming in place of actual conveyance, will be held equivalent to it, so as to be a good ground for applying to the superior for infeftment ; and, upon his refusal, will be a good foundation for a charge of horning. *3tio*, In the present case, Robert Dalziel, the only child of the marriage, has a good claim against the trustees to vest the trust subject in his person. By the death of all the other trustees, this claim is confined to the infant son of John Henderson. It makes no difference whether he is unable or unwilling to fulfil the trust by making a conveyance in favour of Robert Dalziel. If this be not done, the Court must interfere, and decern him to denude ; and Robert Dalziel possessed of this decree, is entitled of course to demand infeftment from the superior.

DALZIEL
v.
HENDERSON
AND DALZIEL.
1756.

" With regard to matters of this kind, it was observed in general, that where the trust-infeftment is held of the King, the person for whose behoof the trust is established, must be infeft by a precept from the Chancery, which the Director must issue upon sight of the order or warrant of the Court ; precisely as where a wadset held of the King is redeemed. But if the trust-subject be held of a private superior, a horning must be issued to compel him to grant infeftment."

The Lords found,—“ That the two debts libelled, and the infeftments thereon, were vested in the trustees for the behoof of the issue of the marriage between the pursuer's father and

DALZIEL
v.
HENDERSON
AND DALZIEL.
1756.

mother ; and found, that the pursuer was the only issue of the said marriage ; and found, that John Henderson, younger of Broadholm, was the surviving trustee, and that the trust was vested in him, descendible to the defender, his only son ; and found, that George Henderson, the defender, ought to be denuded of the said trust in favour of the pursuer. And they declared the trust-subject to belong to the pursuer, and decerned accordingly. And, in order that the said infestments and other securities may be legally vested in the person of the said pursuer, they decerned and ordained Alexander Dalziel of Glenae, the other defender, superior of the foresaid infestments, to grant to the said pursuer proper charters, containing precepts of sasine for infesting the pursuer accordingly."

MS. Notes,
Kames' Session
Papers.

On the petition for the pursuer, Lord Kames has written,—“ I take it for granted, that this trust-right being established, it would be incumbent upon the trustees to denude in favour of Robert Dalziel, the only surviving child of the marriage. But the difficulty is, that the only trustee in being is an infant, the son of John Henderson, younger, who cannot be bound to accept of the trust ; and who, therefore, cannot be bound to make up titles to the feudal subject, and to denude. *Secondly*, Were he bound to make up titles, I know no form in law to oblige him. If Robert Dalziel were a creditor of these gentlemen, he could obtain letters of general charge, and, in consequence of these, an adjudication *contra hæreditatem jacentem* ; but I doubt extremely whether this form of diligence will apply against the heir of a trustee. The only regular method I can think of, is to pronounce decree conform to the conclusion : ‘ That the subjects ought now to be vested in the pursuer’s person ;’ and in consequence of this conclusion, to ordain a warrant to be expedite, empowering the Director of the Chancery to issue out a precept for infesting the pursuer. A general charge will not answer in this case, for what if the infant remains silent, without entering or renouncing ? The common certification will not do ; *namely*, that the heir charged shall be personally liable for the debt.”

III.—DRUMMOND v. MACKENZIE.

In 1738, Sir Robert Munro of Fowlis conveyed to Mr John Gordon, merchant, in trust and for the use of the pursuer and certain other persons, certain subjects, and, in particular, an adjudication deduced by him against the estate of Redcastle, the property of the defender. June 30, 1758.
NARRATIVE.

Mr. Gordon died without having received payment of the sum contained in the adjudication. Upon the title of the adjudication the pursuer brought a process of maills and duties against the tenants of the estate of Redcastle. The defender appeared for his interest, and pleaded, that as the adjudication was conveyed to Mr. Gordon, it descended to his heirs by his death, and, therefore, that they only could insist in a process of maills and duties, and not the pursuer, who could not effectually renounce or discharge the adjudication.

PLEADED FOR THE PURSUER.—Where an estate is purchased, and the title is taken in name of the purchaser, although no mention is made of his heirs, the estate will, by the act of the law, belong to his heirs. The rule of law then is—“*Qui acquirit sibi acquirit heredibus.*” ARGUMENT FOR
PURSUER.

Trusts, however, stand upon a different footing. The trustee has no proper interest in the trust-estate. He is but a name for that person for whose behoof the trust is created. This is especially the case where the trust is declared *in gremio* of the title itself. Where this is the case, the trustee's right is but nominal and personal.

If the trust is granted to a trustee and his heirs, the trust transmits to his heirs not as a part of his estate as succession, but as substituted trustees appointed by the deed itself. Their designation of heirs is but descriptive of the person substituted.

Where, again, the trust is merely personal, and is not granted to the heir of the trustees, it ceases with the person in whom the trust was constituted, and does not transmit to his heirs. By the death of Mr. Gordon, therefore, the trust constituted in his person has ceased. His death evacuated the trust, and the right belongs to the pursuer, for whose behoof it was created.

DRUMMOND
v.
MACKENZIE.
1758.
Select Deci-
sions, p. 208.

LORD KAMES, in his report of the case, observes,—“ This case being reported to the Lords, they agreed upon the following propositions :—1^{mo}. That the trust being given to John Gordon only, and not to his heirs, was at an end by his death ; for there cannot be a trust without a trustee. 2^{da}. That Sir Robert Monro being divested by the trust-deed, the adjudication does not return to him by the death of the trustee. 3th. That though the person for whose behoof the trustee is created, may in his own name insist in every personal action that arises from the trust-deed, yet that none but the trustee can insist in any real action, or any action founded on a real right ; because the trustee is vested in the property or real right, not the person for whose behoof the trust is created.

“ These points being settled, it followed, that there was a subject to which Mr. Drummond had the equitable title, but yet left *in medio* without a legal title, Mr. Gordon the proprietor and trustee being dead ; and the important question was in what manner this equitable right was to be made effectual ? Several methods were proposed that were found insufficient. But at last the Court judged, that the true method for making the equitable right effectual, was to conjoin with it the property by authorizing Andrew Drummond to raise a declaratory adjudication, calling all parties that might appear to have interest, viz., the representatives of John Gordon and of Sir Robert Monro, and concluding that the trust-subject thus left *in medio*, should be adjudged to him in order to make effectual the purposes of the trust. This can be done by the Court of Session supplying the defects of common law ; and that such a process is competent cannot be doubted, when it is considered, that an action was competent to Andrew Drummond against John Gordon himself, to denude of the trust-subjects in his favour ; and the declaratory adjudication comes in place of this process. In the meantime, the Court found it necessary to sustain Redcastle's objection.”

1. " Besides the proper diligence by which land may be attached, there is another judicial proceeding which may be productive of important consequences in competition,—I mean a decree of declarator and adjudication. Declarator is one of those remedies unknown in England, in which the good sense and adaptation of the Scottish law to the occasions and business of life is distinguishable. Without intending to show the various uses to which this form of proceeding may be applied, it is obvious, that on many occasions it is necessary, for the purposes of justice, that a form of action should be provided, by which the true interest of a party in heritable property may be ascertained, so as to prevent the creditors of one who has the apparent property from carrying it off. Thus, where a person has granted a security over his estate by means of an absolute disposition, trusting to the honour of the donee, or where a company has purchased property which, in compliance with feudal rules, is disposed to one of the partners, or a third person, for behoof of the partnership, but without including the declaration of trust in the disposition; the creditors of the apparent proprietor, if there were no remedy, might, by adjudication, judicial sale, or sequestration, carry off this as a fund of division among them, leaving the party to whom truly the right belongs as a mere creditor personally for the value. The remedy, in such a case, is by an action wherein a solemn judicial

declaration can be made of the pursuer's right.

2. " This action is brought into the Court of Session by a summons, stating the circumstances, and concluding, that it should be found and declared that the property truly belongs to the pursuer. This is a real action, in which the object is not to have a decree against the defender as for a debt, but a judgment against the land or other property. And after the commencement of it, no voluntary act of the apparent proprietor is suffered to interfere with or defeat the right to be declared. This action may also admit a conclusion of adjudication for having the land declared and adjudged to belong to the pursuer, and the superior decerned and ordained to receive the pursuer as vassal, and grant to him a charter on which he may be infeft. The effect of such a decree, followed by infeftment in the lands, will be to vest in the pursuer a right which, like that of an adjudication in implement, will not be subject to the *pari passu* preference."—*Bell's Com.*, vol. i. p. 751.

3. The action of declarator was not unknown in the Roman law. It was used in regard to servitudes, and was either positive or negative according as the object was to affirm or deny the existence of a servitude. The action declaring a right of servitude was termed the *Actio Confessoria*, and the action seeking to have land declared free of a servitude was called the *Actio Negatoria*. " De servitutibus in rem actiones competunt nobis, ad

exemplum earum quæ ad usum—fructum pertinent tam confessoria quam negatoria, confessoria ei qui servitutes sibi competere contendit, negatoria domino qui negat. Hæc autem in rem actio confessoria nulli alii quam domino fundi competit. Servitutem enim nemo vindicare potest quam is qui dominum in fundo vicino habet cui servitutem dicet deberi.”—*Digest*, 8, 5, 2.

4. Lord Stair in treating of declarators of servitudes, observes,—“The Roman law had two special actions in relation to servitudes. The one confessor, whereby parties did insist to obtain a servitude to be decerned in their favour. The other negatory, for obtaining a decret declaring them free of such particular servitudes. The same actions are competent with us, but in different way, and by distinct kinds of actions; for when parties insist for servitudes having been in recent use of enjoying the same, they may insist in a possessory action for that effect, because it is the continuation of their possession, and they have no need to declare their right of the servitude. But if they or their authors have not been recently in use of enjoying that servitude, a possessory action is not competent to them, but they must first declare their right, the reason whereof is the same, which makes the difference betwixt possessory and petitory or declaratory judgments.”—*Stair*, 4, 17, 1, 2.

5. “The negatory declarator of servitude is seldom used, because servitudes have not proper possession, but use, and place thereof;

and therefore parties concerned may stop that use, if they find any ground of doubt of the right thereof, without hazard of ejection or intrusion; for thereby the party having right to the servitude may pursue a petitory or possessory action upon the servitude, if he be not long silent as aforesaid. Yet the negative declarator is requisite to liberate the pursuer’s tenement of any pretence of right or possession whereby another may claim a servitude, as pertinent of the pursuer’s tenement, by long possession, or by an insufficient title, accomplished by prescription, especially lest his probation of interruption may fail by the death of his witnesses. This declarator requires no more but the denial of the servitude, which is negative, and proves itself, unless the contrary be proved; and thereupon concludes declarator of liberation from such servitude, decerning the defender to desist and cease from troubling the pursuer therewith. In the confessorial declarator, defences will be competent upon anteriority of the defender’s infestments, before the constitution of the servitude, or upon interruption thereafter; or that the servitude was constituted *a non habente potestatem*.”—*Stair*, 4, 17, 5, 6.

6. “By the failure of the trustees named and vested with an estate, the trust falls. This effect takes place either absolutely, or, if there be interests beyond, the Court will interfere to preserve them. And this is done either, 1, By appointing a curator bonis; or 2,

By a declaratory adjudication in favour of a new trustee suggested by the parties; or 3, By a decree of declarator of trust, containing a warrant to the superior to enter the person having the radical or equitable right. Those measures may be pursued by adjudication on a charge against the trustee's heir; or, where the conveyance is strictly personal, or the heir is incapable or unwilling to interfere, by declarator of trust, without any charge. An example of a declaratory adjudication, calling the representatives of the trustee, and all having interest, will be found in the case of *DRUMMOND v. MACKENZIE*, June 30, 1758; and an example of a declarator of trust, in *DALZIEL v. DALZIEL*, March 11, 1756."—*Bell's Com.*, vol. i. p. 35.

7. The expedient sanctioned by the Court in the two cases of Dalziel and Drummond, may be thought to be inconsistent with sound principle. A feudal right may always be held to be either in the person or in the *hereditas jacens* of some party. It cannot be *in pendente*. Where lands are conveyed in trust to a party and his heirs, the heir is entitled to enter to the trust lands by service or precept of *clare constat*. What, however, an heir may take up voluntarily by service or precept of *clare constat*, he may be charged to take up necessarily by the recognised forms of law. In this case, therefore, an adjudication might have proceeded against the heir of the trustee, on a charge to enter heir to his predecessor, or on his renouncing to be heir, it might

have proceeded against the *hereditas jacens* of his predecessor.

8. Where again lands are conveyed to a trustee, without mention of his heirs, the truster and his heirs are divested only to the extent of the trust conveyance. The investiture of the trustee is the measure of the divestiture of the truster. It would perhaps therefore have been more agreeable to principle, to have held in this case that the trust estate was in the person of the truster or his heir, and that he was bound to denude in favour of the parties, having the equitable or beneficial interest.

9. In the case of *GILLESPIE v. ROBERTSON*, March 11, 1824, a purchaser objected to the title offered to him, on the ground that the seller's title was inept. The circumstances giving rise to the objection were these,—A disposition was granted to two partners of a company, "and to the survivor for behoof of himself, and the heirs of the deceiver, and to his disponees heritably and irredeemably." After infeftment had been taken, one of the partners conveyed his share by a *mortis causa* deed, to his two sons, and died soon after. The sons afterwards executed a deed of agreement and conveyance, by which they conveyed their right to the surviving partner, and declared the subjects contained in the disposition to be his sole and exclusive property. On the death of the surviving partner, his eldest son consulted Mr. Cranstoun, then Dean of Faculty, as to the course he ought

to follow in making up a proper feudal title. Mr. Cranstoun advised, that as the property appeared *ex facie* of the feudal title, to have been held in trust by the surviving partner now deceased, and as the trust did not extend to heirs, and so came to an end by his death, the proper method of making up a title in the person of his heir was to raise a declaratory adjudication, according to the form followed in the case of *Drummond v. M'Kenzie*, and that after obtaining a decree of declarator, finding the trust extinguished, and that he had the sole right to the property, as representing his father, he should complete his title to the property by a precept from the superior.

10. This course was followed by the heir of the surviving partner. He led a declaratory adjudication for having the property which had belonged to the partnership, and which had been held by his father in trust for the company, declared to belong exclusively to himself, as his father's heir, in virtue of the deed of agreement and conveyance by the sons of the predeceasing partner to his father, and the superior ordained to infeft him therein, as heir to his father. On obtaining decree in this action, he then made up a title to the property, on a precept of *clare constat* from the superior. Having afterwards sold the property, the purchaser suspended on the ground that the seller's title was inept, because the *pro indiviso* share, belonging to the predeceasing partner, ought to have been taken out of his *hereditas jacens*, by the sur-

viving partner expeding a service to him as heir of provision under the investiture. The Court refused the bill of suspension, and were satisfied that the title had been correctly made up, and that the case of *Drummond* was a precedent in point.

11. The objection taken by the seller was not founded on the incompetency of the heir of the surviving partner bringing a declaratory adjudication, for the purpose of having the trust, which appeared *ex facie* of the investiture, declared extinguished, and the lands adjudged to him as his exclusive property. The objection proceeded on the ground that the right of the predeceasing partner under the investiture was still in *hereditate jacente*, and that it ought to have been taken up by the surviving partner, as heir of provision under the investiture. This, however, was unnecessary. By the terms of the investiture, the conveyance was in favour of both partners, and the survivor for behoof of himself, and the heirs of the predeceasing partner. On the death of one partner, it was unnecessary for the surviving partner to serve heir of provision to the one predeceasing, as the right in the predeceasing partner accresced to him by survivance, and there was no necessity for a service. Effect was given to this doctrine in the case of *BISSET v. WALKER*, Nov. 26, 1799.

12. In that case, two sisters purchased a property with their joint funds, and took the titles to themselves, and "the longest liver

of them two their heirs and assignees." They afterwards, by a joint-disposition, *mortis causa*, conveyed the property to the defender. At the date of the disposition, the elder sister was on deathbed. The younger sister survived her about three years, and died without serving heir to her. On her death, the pursuer, who was heir-at-law of both sisters, brought a reduction of the disposition in favour of the defender, in so far as related to the elder sister's share, as having been executed on deathbed. The important question came to be, Whether the eldest sister's right had vested in the younger sister without a service? The pursuer PLEADED,—Although it were admitted that, by the terms of the investiture the fee of the whole property went to the survivor, still a service was necessary to vest the feudal right in her. If then a service was necessary, the youngest sister died in apparenacy in regard to her eldest sister's share, and she could not in apparenacy gratuitously dispose that share. The defender PLEADED,—When a right is vested in two persons, and the longest liver of them, the survivor has not a liferent merely, but an absolute fee in the whole. The younger sister came to have the same right which both had formerly; and as she did not succeed to her elder sister as her heir, but took her share in terms of the investiture, a service was unnecessary. The Court by a great majority found,—“That by her surviving Elizabeth, the fee of the whole subjects became vested in Margaret, and was

carried to the defender by the settlement, and therefore assoilzied the defender.” In the Faculty Report it is stated,—“On advising the petition with answers, the case was considered to be attended with much nicety. The right of the sisters, it was observed, may be compared to that of trustees, or of a corporation, which transmits to the survivors without a new investiture. Each had an immediate fee in a half, and an eventual one in the whole.”

13. In *CRAWFURD v. THE EARL OF DUNDONALD*, May 22, 1838, the pursuer, conceiving herself to be in right of an adjudication which had been originally taken in trust by a party for her predecessor, brought an action against the heir of the trustee, and against the representative of the original debtor, setting forth that the heir of the trustee had refused to serve himself heir and to take up the trust, and concluding to have it declared that the trust had fallen and expired, and that the right to the adjudication belonged to the pursuer, and that as coming in place of the truster, she had right to apply for and obtain charters of adjudication for feudally vesting the right in her person, so that she might hold it as freely in all respects as if the trust had never been constituted. LORD JEFFREY, Ordinary, found, “that the pursuer had no title to pursue, and that even if she had, the action was incompetent.” On the latter point his Lordship observed,—“But even if the substantial right were properly vested, it is plain that the

present would be an incompetent form of making it effectual, and that without charging the heir of the trustee, and adjudging from him, no sufficient title to the original adjudication can be vested in the pursuer. The case of Drummond has really no application; the case *there* allowed having been justified entirely by the necessity arising from the death of an individual trustee, for whom no successor was provided by the deed. But the trust in this case was expressly conceived in favour of the trustee named and his heirs, and it is admitted that he has an heir existing and accessible. The right, therefore, has not fallen and become so sopite or extinguished as in the case of Drummond, but is in *hereditate jacente* of the original trustee, and capable of being adjudged from his known heir by a familiar process of law."

14. The Court adhered to Lord Jeffrey's interlocutor, in so far as it found that the pursuers had no title, but recalled the same *quoad ultra*. LORD GLENLEE observed,

—"The first question is—Whether, really and truly, the pursuer has any title? As to the second head of the interlocutor, it is an important point of law which is agitated. The leading case of Dalziel does not seem to have been stated to the Lord Ordinary. With that case before me, I should be inclined to think that a declarator is a competent mode of obtaining right to an adjudication in such a case as the present, supposing the title to be good. But the pursuer has no vestige of a title that I can see. On this point, therefore, I think the interlocutor right." LORD MEDWYN observed,—“I am not sure that I can agree as to the want of title. If there is a title, I do not see any objections to the conclusions of the action.” LORD JUSTICE BOYLE observed,—“After considering the argument, I am satisfied that the debt was rendered heritable. I agree with Lord Glenlee, that there is a difficulty as to the second point of the interlocutor.”

SECTION IX.

DECREE OF SALE.

A Decree of Sale will not operate against a preferable right of Property in a Party not called in the Process of Sale.

I.—ROLLO v. DUNDAS.

IN 1680, Thomas Wylie conveyed a tenement of land, consisting of several stories, to his eldest son Thomas, who was infeft upon the disposition in 1688. The disposition contained a power of revocation. In 1690, he executed another disposition in favour of his second son Henry, by which he conveyed to him the second story of the tenement, along with a cellar. Upon this disposition Henry was infeft in 1697.

Nov. 9, 1739.

NARRATIVE.

In 1696, the eldest son Thomas granted an heritable bond in favour of George Leslie, who was infeft in 1697. In 1701, James Leslie, the son and heir of George Leslie, obtained a decree of poinding the ground, and in 1707, he obtained a decree of adjudication against Thomas Wylie, adjudging the whole tenement of land to belong to him in payment of his debt. In 1696, another heritable bond was granted by the eldest son, in favour of Mr. John Peap, on which he was infeft in 1700, and in 1726 an adjudication was led upon this debt.

Thomas Wylie was survived by his brother Henry, and after the death of Henry a process of ranking and sale was then brought by the creditors of Thomas Wylie the younger, and in this action John Wylie, the eldest son of Henry Wylie, was called as apparent-heir of Thomas Wylie his uncle. In this process the first story of the tenement was purchased by Archi-

ROLLO
v.
DUNDAS.
1789.

bald Angus, without any exception of the cellar, which, along with the second story, had been conveyed to Henry Wylie, and the purchaser thereafter made over his right to the defender.

Sir Henry Rollo of Woodside was a creditor of Henry Wylie, and upon a decree *cognitionis causa* against John Wylie, his eldest son and apparent heir, obtained in 1711 an adjudication of the second story of the tenement, and the cellar thereto belonging, on which he was infest in 1730. The pursuer Lady Rollo, as heir to her father, brought an action of mails and duties against the defender for the rent of the cellar. The defender pleaded the decree of sale.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The cellar in question was the property not of Thomas Wylie, but of Henry Wylie his brother, in virtue of the disposition in his favour granted by his father in 1690. Although the cellar was comprehended in the decree of sale, that ought not to cut off the right that was in Henry Wylie, even though his apparent heir, the very person called in the process of sale, was now insisting upon it. If Henry Wylie's heir had appeared in the process of sale, and objected that the cellar in question, as belonging to his father Henry, and not to his uncle Thomas, of whose estate only an action of ranking and sale was raised, he would have succeeded in preserving his right to the cellar as heir of his father, against the creditors of his uncle, and prevented it being exposed to sale. The question then is, Whether the fact of Henry Wylie's apparent heir being called in the action of sale, and not appearing to plead his title to the cellar, can have so strong an effect as to cut him out of his right?

It is true, that great regard is due to judicial sales. If, however, a subject be comprehended in a decree of sale which does not belong to the bankrupt, at the instance of whose creditors the sale is carried on, but to another person, it cannot be held that that third person is thereby cut out. The law has declared, that judicial sales shall be as effectual to the purchasers as if made by the bankrupt and all his creditors having rights affecting the lands sold; and that these lands shall be freed and disburdened of all the deeds of the bankrupt and his predecessors. The law, however, has nowhere said, that by virtue of a judicial

sale, a purchaser shall carry right to a subject not belonging to the bankrupt. With regard to the question, whether any subject was the bankrupt's or not, the purchaser is left in the same condition as if the sale had been voluntarily made by the bankrupt and his creditors. In that case, undoubtedly no right that was not in the bankrupt and his creditors could be conveyed. The heir of Henry Wylie then might reasonably imagine that no person would purchase the cellar in question, since it could not be made appear to belong to the bankrupt.

ROLLO
v.
DUNDAS.
1789.

But even although it were to be held that Henry Wylie's heir might himself be cut off from any title to the subject in question, on account of his neglect to appear in the action of sale, yet that ought not to prejudice the pursuer's right. John Wylie, the heir of Henry, was denuded of all right to the subject in question, by the adjudication obtained by the pursuer's father in 1711. No deed, therefore, or neglect on the part of John Wylie could hurt a third party who before that deed or neglect had a right in his person to that subject. If the pursuer's father had been infeft upon his adjudication of 1726, before the commencement of the process of sale, the decree of sale could not have cut off a right completely established in his person, since it is not pretended that he was called in the process. The pursuer's father was infeft on his adjudication in 1730, during the dependence of the process of sale, and nearly five years before the decree was pronounced. If, however, a right completed before the commencement of the process of sale could not be cut off by the decree of sale, there seems no good reason why a simple adjudication should be liable to such an exception, since the one appears upon record as well as the other, and therefore may be known to any purchaser.

As therefore the cellar in question was the property of Henry Wylie, and not the property of Thomas Wylie the bankrupt, it could not be conveyed by the decree of sale, and the pursuer has right to insist in the present action against the defender, notwithstanding that decree.

PLEADED FOR THE DEFENDER.—As Thomas Wylie, the father, conveyed the whole tenement of land, in 1680, in favour of his eldest son, and the debts contracted by him affected

ARGUMENT FOR
DEFENDER.

ROLLO
v.
DUNDAS.
1789.

the whole tenement, no posterior disposition by the father could militate against the creditors of the son. The granting of such a disposition was *ultra vires* of the father, he being already denuded in favour of his son. Besides, Henry Wylie, the second son, survived his elder brother, and succeeded him in his estate. He became thereby liable for all his brother's debts and deeds; and it would appear that both he and his brother were bankrupt.

The process of ranking and sale was carried on by the creditors of Thomas the elder brother, but the heir of Henry was expressly called, and the tenement was liable to be adjudged to the purchaser from John Wylie, the heir-apparent of Henry his father, as well as of Thomas his uncle. The process was regularly carried on, the heir and creditors in possession being called personally. At this time Sir Henry Rollo, the father of the pursuer, was not in possession, for no infetment followed upon his decree of adjudication, till the year 1730, and even upon that infetment no possession ever followed.

The process of sale was commenced in 1726. At this time the pursuer ought to have appeared in order to be ranked in her proper place, in case she had any claim upon the subjects sold. Having allowed the sale to go on, it must now stand good. The purchaser was bound to pay the price conform to the ranking, and he cannot now be liable to any creditor who neglected to produce his interest in due time. The Act of Sederunt 1711, expressly declares, "That if any person lawfully summoned, either in common form or edictally, suffer the decret of ranking to go out without producing and competing upon his interest, the decret and sale shall not the less stand good, and the pursuer be bound to pay conform thereto, and the person failing shall have no other remedy but to pursue the receivers of the price, and their heirs, as accords."

The purchase of the subject in question having been made at a public roup, that alone is sufficient to exclude the pursuer's action. Since the Act of Parliament 1681, regulating the sale of bankrupts' lands, many estates are no otherwise secured to the proprietors than by decreets of sale. If these should be reduced by creditors, who are only cut out by their own neglect, as in the present case, purchases of this sort would be

exceedingly precarious, and there would be but few probably in time to come.

ROLLO
v.
DUNDAS.
1789.

In other cases, the rights of authors are more carefully looked into. Expired appraisings and adjudications are subject to review upon nullities and informalities, because there the creditor looks to his own securities. Even assignees purchasers of such rights are in the same case by the law *caveat emptor*. In these cases, therefore, where a creditor is misled, he has himself only to blame ; but it is and ought to be otherwise in sales, where the Court are in some respect the legal authors of the purchase, and do before adjudging the purchase sold to the highest offerer, review the whole steps of the process, and find and declare, that the same have proceeded regularly. Were it otherwise, purchasers at public rouns would not be easily found. They purchase on the faith that their purchases are absolutely secure. Whatever objection is stated after the Court has found that the sale has regularly proceeded, must be held as coming too late. It must be excluded on the ground of being competent and omitted.

In regard, therefore, that Thomas Wylie was, in 1688, infeft in the whole tenement, and that the rights and diligences of the creditors upon which the process of sale was instituted, affected universally the whole tenement, and in regard that the purchase was made at a public sale, and upon the public faith, the defender ought to be assolizied from the present action, without prejudice to the pursuer to proceed against the receivers of the price of the subjects sold.

LORD KILKERRAN, Ordinary, found,—“ That it was competent for the pursuer, in right of her adjudication of the cellar in question, deduced by her predecessor against the heir of Henry Wylie, to object to the decreet of sale, as conveying a subject which did not belong to Thomas Wylie the bankrupt, but to the said Henry Wylie, her predecessor’s debtor, notwithstanding that John Wylie, the apparent heir to Henry Wylie his father, be therein called as heir to the said Thomas Wylie his uncle, and found it instructed by the disposition and infeftment thereon, flowing from Thomas Wylie elder, in favour of Henry Wylie his second son, that the cellar in question belonged to the said Henry Wylie, and not to the said Thomas Wylie the

Interlocutor of
Lord Ordinary,
June 21, 1789.

ROLLO
v.
DUNDAS.

bankrupt, and therefore repelled the defence founded on the decret of sale."

1789.

JUDGMENT.
Nov. 9, 1789.
Kilkerran's
Session Papers.

The defender having reclaimed, the Lords, upon advising petitions and answers, " Found the sale now unquarrellable, in so far as the subject in question was sold, and before answer remitted to the Ordinary, to inquire how far that part of the first story in question was actually sold, and to determine or report."

Nov. 21, 1789.

MS. Notes.
Kilkerran's
Session Papers.

On a reclaiming petition by the pursuer, the Court adhered.

Elchies' Deci-
sions, vol. ii. p.
392.

On the pursuer's petition, LORD KILKERRAN has written, " This petition was refused by the President's casting vote."

In the Notes to his Decisions, LORD ELCHIES observes,—“ The question, though about a small subject, was of some importance,—How far a sale before the Lords could be quarrelled by a third party, having right to the subject, not derived from the bankrupt ? The Lords found, that Henry Wylie the son and heir of Henry, as well as of Thomas the bankrupt, being called in the sale, neither Henry nor any of his creditors can quarrel the sale. And they thought the Act of Parliament had the same effect, which provides that the subject shall be free from the debts and deeds of the bankrupt or his predecessors ; and Henry's right flowed from the predecessor of the bankrupt. Afterwards adhered.”

II.—URQUHART v. OFFICERS OF STATE.

Feb. 6, 1757.

NARRATIVE.

In 1588, Sir William Keith obtained from King James the Sixth a charter of the lands and barony of Dalry, containing an erection of the kirk of Cromarty, and other eighteen kirks therein mentioned, which had formerly belonged to the Bishop of Ross and his chapter, into parsonages, and granting to Sir William the teinds and parsonages thereof, and erecting the whole into one barony, called the Barony of Dalry. Sir William was infeft upon this charter in the same year.

In 1555, Sir William disposed the barony and patronages to his brother John, who was infeft. John disposed to James

Lord Balmarino, whose son John disposed to Sir Robert Innes in 1631. In 1656, Sir Robert Innes disposed to the Earl of Cromarty, who disposed to his son Sir Kenneth Mackenzie, to whom Sir George Mackenzie succeeded. At a judicial sale of Sir George's estate, the patronage of the kirk of Cromarty was sold to the pursuer, who brought a declarator of his right.

URQUHART
v.
OFFICERS OF
STATE.
1757.

The defenders pleaded that Sir Robert Innes was denuded of the right of patronage in 1636, by a conveyance to the Bishop of Ross, which was twenty years prior to the conveyance by Sir Robert to the Earl of Cromarty, and that the Crown was now in right of the Bishop of Ross. Besides stating various other pleas, the pursuer founded on his right under the decree of sale as being unchallengeable.

PLEADED FOR THE PURSUER.—The pursuer is in a very different position from ordinary purchasers. He has bought the right in question at a judicial sale, upon the faith of an Act of Parliament. The Act 1695, c. 6, for the purpose of encouraging the lieges to purchase such estates, has enacted, "That the purchaser paying the price offered, to the creditors as they shall be ranked by the Lords of Session, shall be for ever exonerated, and that the lands and others purchased and acquired shall be disburdened of all debts and deeds of the bankrupt or his predecessors from whom he had right." It would be inconsistent with this proviso in the Statute, if the pursuer was to be disquieted in the purchase he has made of the patronage in question, as derived from the family of Cromarty, upon pretence of any deed of Sir Robert Innes's, from whom they had right.

ARGUMENT FOR
PURSUER.

The defenders do not give judicial sales the security intended for them by this Statute, when they make them no better than conveyances granted by the bankrupt, with consent of all his creditors. Such conveyances would not exclude the deeds of the bankrupt's predecessors, and yet they are in express words excluded by the Act. If a purchaser will have right to the estate, although the bankrupt's predecessor had been denuded of the property in favour of a third party, it is not easy to discover why a difference should be made, because the deed by which the lands are liable to be evicted was not granted by the

URQUHART
v.
OFFICERS OF
STATE.
1757.

immediate ancestors of the bankrupt to whom he serves heir, but by his or their authors from whom he had right.

The reason of the thing applies equally to both cases. The party entitled to the lands sold has no more reason to complain when his title is derived from one of the bankrupt's authors, such as Sir Robert Innes, than if it had been derived from the Earl of Cromarty, one of the bankrupt's ancestors. In either case he would be equally preferable to the bankrupt or his creditors who have received the price, although it secures the purchaser for the sake of public expediency, and the general quiet of the mind of the lieges.

If purchasers at judicial sales were subjected to the hazard of having their purchases evicted from them by latent deeds of the bankrupt, or of those from whom he derived title, it would destroy the faith and credit of such purchases, which are now esteemed the best securities in Scotland. By the words of the Act 1695, the purchaser is for ever exonerated, and the lands purchased are disburdened of the debts and deeds of the predecessors of the bankrupt, from whom he derives right. According to the plain intention of the Statute, the lands ought likewise to be disburdened of the debts and deeds of the author or first donor, from whom the bankrupt derives right through his predecessors. The mischief to the purchaser is the same, whether the estate be evicted by the deeds of the one or the other ; and as to any hardship which may be supposed to arise from selling the estate of one man for payment of the debts of another, the Statute hath provided a remedy by giving the recourse against the creditor to receive the price.

ARGUMENT FOR
THE DEFENDERS.

PLEADED FOR THE DEFENDERS.—The pursuer mistakes and misapplies the words, as well as the true intent and meaning of the Act 1695. Sir Robert Innes, who is the common author of both parties, was not the predecessor of Kenneth Mackenzie of Cromarty, for whose debts, or those of Sir George's son, the patronage in question was sold. The Crown, as in the right of the Bishop of Ross, had a title to the patronage in virtue of the disposition 1566, preferable to any title that was vested in the family of Cromarty. It would indeed be strange if it was law, that by virtue of a judicial sale of this patronage, brought at

the suit of the creditors of Mackenzie of Cromarty, the King, who was not made a party to that suit, should be ousted of his lawful right without remedy.

URQUHART
v.
OFFICERS OF
STATE.
1757.

The law of Scotland, however, admits of no such absurdity or iniquity. It provides nothing but what justice required, namely, that the estate which belonged to the bankrupt, such as it was, might be sold by the Court for payment of his debts, whether the bankrupt should consent to the sale or not. The law never intended to give the purchaser a greater estate or interest in the subjects sold, than had truly belonged to the bankrupt himself, or consequently to his creditors. The design and intent of the law was, to transfer to a purchaser for the use of the creditors, the estate that was truly in the bankrupt, but not to create for their use any new estate or interest that never belonged to him, or to give away for payment of his debts what belonged to third parties who were not called in the process of sale, and who had no opportunity to defend that title. To have done otherwise would have been iniquitous and absurd.

The meaning of the clause in the Act 1695, founded on by the pursuer, is, that the purchaser, on paying or consigning the price, should have all right or title which had belonged to the bankrupt or his predecessors, and that was descendible or competent to him, and which he and his creditors jointly had it in their power by voluntary deeds or conveyances to have made over for the payment of his debts. This sense of the Act is farther evident from the words that immediately follow in the same clause, namely, "And that the bankrupt, or his heirs, or apparent heirs or creditors, without exception of minority, not compearing, or conceiving themselves to be prejudged, shall only have access to pursue the receivers of the price, and their heirs, and reserving to the minor's lesed his relief as accords."

All this provision is made in respect of persons who are entitled to claim in the right of the bankrupt himself, and to take their dividend of the price of the estate that was truly in him their debtor. There is not, however, one word in the clause, or in the whole Statute, importing that one man's estate uncalled in the process may be effectually sold to his prejudice for payment of another man's debts, or that third parties, strangers to the bankrupt, his predecessors and creditors, who may be pos-

URQUHART
v.
OFFICERS OF
STATE.
1757.

sessed of prior and preferable titles, derived from a remote common author to them and the bankrupt, to any estate that was nominally in the bankrupt's person, may, by a process of sale, at the suit of one of his creditors, be finally deprived of their rights and possessions without knowing how or wherefore.

JUDGMENT.
July 28, 1758.

On report of Lord Kilkerran, the Lords "Repelled the allegation founded on the Act of Parliament 1695, and found, that the right of the Crown is not barred by the decret of sale, and remitted to the Lord Ordinary to proceed accordingly."

Journals of
House of Lords.
Feb. 6, 1757.

The pursuer having appealed to the House of Lords, LORD HARDWICKE, Chancellor, presiding,—“It was ordered and adjudged, that the cross appeal be dismissed, and that such parts of said interlocutor of July 28, 1753, as are therein complained of, be affirmed.”

1. “Decree of judicial sale is truly an adjudication, proceeding at the instance of a creditor holding a real security over the estate, where the debtor is insolvent; or, without insolvency, at the instance of an apparent heir of the debtor, as trustee for the creditors, and for his own eventual interest. The object of the action is to have the debtor's estate brought to public sale, and the price divided among the creditors. It differs from adjudication so far, that there is no legal; no power or time left for redemption; it is an absolute adjudication to the purchaser. The decree adjudges the estate, as in a common adjudication, but irredeemably, to pertain and belong to the purchaser, and ordains the superior to infeft and seise the purchaser as vassal in the lands. The decree of sale is followed by a

charter of sale and adjudication, containing a precept for infeftment. And sasine being taken, and duly recorded, the feudal title is complete. This is esteemed a title of a very eligible kind.”—*Bell's Principles*, p. 310.

2. In the case of *CHALMERS v. MIRETON*, June 21, 1720, a decree of sale produced by the purchaser, was found sufficient to exclude the pursuer's title. The bankrupt, at the instance of whose creditors the judicial sale had taken place, had only a liferent interest in the estate sold. The fee was in his son, the pursuer, who was an infant at the time of the judicial sale. He afterwards brought a process of reduction against the defender, who had purchased the estate, to have his title set aside. The purchaser produced his decree of sale, and contended that

his right by that decree was unchallengeable, in virtue of the Act 1695, regarding the sale of bankrupt estates, and that his right, in virtue of the decree of sale, excluded the pursuer's action, as it was sovereign and unexceptionable, standing upon the public faith. The Lords found,—“That the decret of sale was a sufficient production made for the purchaser to exclude the pursuer's title.”—*Dalrymple's Decisions*, p. 250.

3. “Every purchaser of a bankrupt estate, who shall pay the price to the creditors ranked, or, in case of their refusal to receive payment, shall, after a year from the sale, consign it in the hands of the Magistrates of Edinburgh, is, by Act 1695, c. 6, declared to be discharged of his obligation, and the lands are declared disburdened of all the debts and deeds of the bankrupt, or his ancestors or authors; and the only remedy provided by that Act to such of the bankrupt's creditors as judge themselves prejudiced by the sale and division of the price, is an action for recovering their share from the creditors who have received it; but no action lies at their suit, though they should be minors, against the purchaser himself. Yet this cannot be understood, as if such payment or consignment conferred any stronger right to the lands upon the purchaser, than was competent to the bankrupt, which was nevertheless explicitly adjudged, *COUPER alias CHALMERS v. MIRETON*, plainly contrary to the common rules of law, and, indeed, to common equity; for though the purchaser ac-

quires all right vested in, or descendible to the bankrupt from his ancestors or authors, it cannot hurt third parties, who may have had a right preferable to that of the bankrupt, and who, not being called as defenders, had no access to know of the sale, and upon that account, no opportunity of appearing for their interest.”—*Erskine*, 2, 12, 63.

4. “A decree of judicial sale, when properly completed as a feudal title, is regarded as the best and the most eligible that a purchaser can receive; and yet many seem to talk of the goodness of such a title, without knowing precisely in what its virtue consists. The right acquired by judicial sale rests upon an irredeemable decree of adjudication, secured against all objection on the part of the debtor, and those deriving right from him by its judicial nature as a decree, and by the declarations in the Acts of Parliament which establish it; against all claims of creditors, by the extinction of the real securities, and by the decree of certification, which, to the effect of securing the purchaser, holds every debt not produced to be false and forged; and, finally, against any claim of eviction from other quarters, by the warrandice of the conveyances to the debts of the creditors, and the consequent right of recalling from each the sum paid to him. This seems to comprehend all the circumstances of extraordinary security which the purchaser enjoys from this sort of title.

5. “Yet it was contended once, nay, actually decided by the Court,

that a judicial sale is a title of a much stronger kind; that, being so public an act, so carefully and anxiously advertised, not only by citations, both special and edictal, to all who may be interested, but also by advertisements in the newspapers and publications of every possible kind, a purchaser should not be exposed to the claims of strangers, in the character of proprietors, since they ought to have appeared before the sale; and that the only remedy for them should be, an action against those to whom the price had been paid. But another view came to be taken of this question, when the true principles were better understood; and the right of a third person not called as a party in the sale, was sustained against the purchaser.

6. "It is no longer, then, to be questioned, that a judicial sale gives no protection against the claims of third parties, whose right is not derived from the bankrupt, and who were not parties in the action of sale. And there seems to be as little doubt, that, upon the emerging of any claim which undermines the right that was in the bankrupt, the purchaser would be entitled to suspend the payment of the price, until he were relieved from it. As the purchaser, then, has no protection against claims of eviction from third parties whose rights are preferable to that of the bankrupt; as his right is in nothing better than that of the bankrupt himself; and as the legislature, by introducing a mode of selling the property of the bankrupt, had no design of creating a

new estate for him,—all that the purchaser has to trust to in this respect is, on the one hand, a strict search of the records, and a scrupulous examination of the title-deeds; and, on the other, the obligation of warrandice contained in the conveyances from the creditors."—*Bell's Com.*, vol. ii. pp. 277, 280.

7. The judgment in the case of *ROLLO v. DUNDAS* is rested by Lord Elchies on two grounds,—*First*, That the son and heir of Henry Wylie was called in the process of sale; and, *Second*, That the subject in question flowed from the predecessor of the bankrupt. The ground of the judgment is thus stated in his Decisions: "But in respect that Henry's own right flowed from Thomas, the father and predecessor of Thomas the bankrupt, the Lords found,—That John, the son and heir of Henry, as well as heir of his uncle Thomas the bankrupt, having been called in the sale, neither John, nor any of his father's creditors, can quarrel the sale." The judgment of the Court was carried by the casting vote of the President, and was a recall of the Interlocutor of Lord Kilkerran, who had sustained Lady Rollo's claim. In so far as the judgment rested on the fact, that Henry's heir had been made a party to the process of sale, the judgment may, perhaps, be thought sound; but in so far as it rested in the fact of Henry's right having flowed from the predecessor of the bankrupt, its soundness may perhaps be doubted. At the same time, as the bankrupt was infest in the subjects

in question, and as some of his creditors, at whose instance the sale proceeded, were also infeft prior to the date of Henry's right, his right must have been held burdened by the infeftments previously granted by his brother.

8. In the case of *MIDDLEMORE v. MACFARLANE*, March 5, 1811, it was held, that in a sale by an apparent heir, the right of the purchaser could not be affected by the appearance of a nearer heir, and that recourse could only be had by such heir upon the receivers of the price. In that case, the contingency of a nearer heir depended on the daughter of the ancestor, for whose debts the estate was sold, being able to establish her legitimacy. The purchaser brought a suspension of a charge for payment of the price, on the ground of the possibility of a nearer heir being in existence. LORD PRESIDENT HOPE observed,—“ In the case of ranking and sale, the fullest notification is given to all concerned, by edictal citations and advertisements, and by the greatest caution and deliberation of process. Even if Victoire Middlemore were to establish her legitimacy in a regular declarator, of which I see not the smallest probability, and were to pursue a reduction of the service, what would be her remedy? Would she be entitled to set aside the sale? Certainly not; the property having unquestionably belonged to Mr. Middlemore, and having been brought to sale for debts undoubtedly due by him, the sale, which proceeded at the instance of a party having the best

title known in law, could not be challenged. In the Statute 1695, c. 6, authorizing the sale of estates at the instance of creditors, it is enacted, that the claim of any heir afterwards appearing shall lie only against the receiver of the price.

9. “ But it is maintained that this enactment is confined to sales at the instance of creditors, and certainly at that date a sale at the instance of an apparent heir was not known. But when, by an Act passed in the same Session of Parliament, 1695, c. 24, an apparent heir is authorized to pursue a sale, whether the estate is bankrupt or not, it cannot be supposed that the legislature meant to make a distinction, and that the one sale was not to be equally effectual with the other. I am of opinion, that the provisions of the former Statute, relating to the sale of estates at the instance of creditors, do, in fair construction, apply to this extent to the case of sales at the instance of apparent heirs; and that a sale having regularly taken place is conclusive as to the security of the purchaser, against any person deriving right from, or through the individual whose estate is sold. If so, what right has the purchaser to interfere? He will be completely exonerated by payment to the creditors, and to the heir having right by a service unchallenged. Where a person founds upon a regular service as a title to uplift money, the debtor cannot object that there is a possibility of the service being reduced, and that the illegitimacy of any children of the predecessor must be proved.”

SECTION X.

TRUST ADJUDICATION.

An Heir-Apparent may complete a Title to his Ancestor's Estate by means of an Adjudication proceeding on a Trust-Bond granted by himself, and conveyed to him by the Trustee ; and an Adjudication so conveyed, although not feudalized, will operate to the effect of altering the destination in the last Investiture.

HEPBURN v. SCOTT.

July 25, 1781. **NARRATIVE.** IN 1748, on the death of Patrick Scott of Kingston, the estate devolved on Patrick Scott, his sister's son. Instead of making up titles by service to his uncle, he granted a trust-bond, upon which, after a special charge, adjudication was led by the trustee. The adjudication was then assigned by the trustee to Scott, and upon that title he possessed the estate till 1799, when he died without issue. A competition then ensued between his heir-at-law and Patrick Hepburn, the heir of the investiture, who was served heir to the person last infeft.

ARGUMENT FOR THE HEIR OF THE INVESTITURE. PLEADED FOR THE HEIR OF THE INVESTITURE.—When the Statute 1621 substituted a charge against the heir in the place of a service, the legislature did not intend to infringe upon the legal possession, nor to vest in the apparent heir an active right to the property of the estate. An adjudication warranted by this Act differs not in matter or in form from other adjudications, and its effects are to be regulated by the same principles. Unless secured by declarator of expired legal, or by the positive prescription, it cannot convey the absolute property,—that must

remain *in hæreditate jacente* of the ancestor, till taken up by the service of the heir of the investitures.

HEPBURN
v.
SCOTT.
1781.

Considered merely as a right in security, an adjudication is extinguishable either by a discharge from the creditors, upon payment of the debt truly due, or by any relevant exception against the obligation which the right is intended to secure. In this case, there is the clearest evidence, from the adjudger's back-bond, that no debt was, in truth, due to him. By the assignment of the adjudication to the person against whom it was led, the debt, if any had ever really existed, must have been at an end.

Adjudications on trust-bonds, considered as tentative processes, are useful to apparent heirs, uncertain of the situation of their predecessor's funds ; but no heir ought to rest satisfied with that title. Nor would any person purchase an estate held under it, but would require the heir to enter by service or precept of *clare*, which are the established modes of acquiring property by succession in Scotland.

PLEADED FOR THE HEIR-AT-LAW.—The mode of acquiring right to an estate belonging to an ancestor, without service, although not in the view of the legislature, was a natural consequence of the Act 1621. The heir, by the charge, *fictione juris*, enters to the estate of his predecessor, so far as respects the sums for which the diligence is used. When, therefore, an apparent heir granted bond for a sum exceeding the value of an estate, and on the bond, qualified by a separate deed containing a power of defeasance in favour of the truster, the trustee led an adjudication in terms of the Statute 1621, this adjudication, assigned by the trustee to the heir, effectually vested him in the absolute property of the estate ; and, upon his death, before assignment, the right of obliging the trustee to reconvey, descended to his representatives.

ARGUMENT FOR
THE HEIR-AT-
LAW.

Apparent heirs, by means of this contrivance, were enabled to possess the estate of their ancestor, upon a singular title, and without representing the ancestor in his debts. This abuse was obviated, first, by an Act of Sederunt in 1662, and thereafter, more completely by the Act 1695, c. 24. But an adjudication upon a trust-bond is, by the enactment, declared to be a mode by which

HEPBURN
v.
SCOTT.
1781.

apparent heirs succeed to their ancestors, and is viewed in that light by every lawyer who writes upon the subject.

The practice of granting trust-bonds, for the purpose of facilitating the transmission of feudal rights, without producing the investitures, and without the consent of the superior, was an early invention of the law. But it would have been a very unavailing one, and little followed, could the superior elude it by the objection here made. And to admit the exception in this competition, would render insecure most of the land rights in the country, which, at one period or another, have been conveyed by the form which has been adopted in this case.

Interlocutor of
Lord Ordinary.

The Lord Ordinary found,—“ That an adjudication upon a trust-bond is a method of making up titles to an estate known and established in the law of Scotland ; and it vests an active right in the truster, and transmits to his heirs.”

JUDGMENT.
July 25, 1781.
OPINIONS.
Faculty Report.

The pursuer having reclaimed, the Lords adhered.

OBSERVED ON THE BENCH.—“ Mr. Hepburn did not insist to be allowed to redeem upon payment of the sums of adjudication ; neither, in the present case, was it competent, as the legal was expired ; and the equity of redemption could not operate in his favour against the representatives of the apparent heir.”

1. In the case of GLENDINNING v. THE EARL of NITHSDALE, January 22, 1662, the Earl having been sued for a debt of his father as lawfully charged to enter heir to him, PLEADED absolutor, as he offered to renounce to be heir. The pursuer PLEADED,—That the defence ought to be repelled, because the defender had done a deed prejudicial to his renunciation by granting a bond to the Earl of Dirleton simulately to his own behoof, upon which his father's whole estate had been adjudged, and the

adjudication assigned to the defender himself, and so having intromitted on that simulate title, with the maills and duties of his father's lands, he had behaved as heir, and could not renounce. The defender not only offered to renounce, but also to purge the adjudication, and to declare that it should not prejudice the pursuer, and that he should be accountable for the price of any lands he had sold, or any rents he had uplifted. The pursuer objected to the offer, and insisted that the defender hav-

ing once behaved himself as heir, no offer nor renunciation could be received. The defender ANSWERED,—His intromission could not be held as *gestio pro hærede*, because it was *singulari titulo*, and not as heir, and that *in gestione* there must appear *animus adeundi aut immiscendi*. The granting of the bond, and taking right to the adjudication thereupon, was of purpose, that the intromission might not be as heir, or as immixtion, which can never take place without an illegal and unwarrantable act, whereas all that was done by the defender was legal, there being no law nor custom to hinder the Earl to grant a bond, although gratuitous; and after the lands were adjudged, there was no law to hinder him from taking assignation to it, and possessing upon it any more than a stranger might have done. The pursuer REPLIED,—The defender having intromitted with the rents of his predecessor's land, which, although not done *animo adeundi*, yet *animo immiscendi et lucrandi*, it cannot be maintained by a simulate null bond granted by the defender for his own behoof, and adjudication thereupon. If the defender's intromission were sustained, no person would ever seek to enter heir to his predecessor, but take this indirect way, to the defraud and vexation of creditors. Lord Stair, in his Decisions, observes,—“The Lords, after long consideration and debate in the matter, found the Earl's offers relevant, but resolved to make and publish an Act of Sederunt against any such courses in

time coming; and declared, that it should be *gestio pro hærede* to intromit upon such simulate titles.” —*Stair's Decisions*, vol. i. p. 86.

2. An Act of Sederunt was accordingly passed by the Court of Session, entituled, “Act against the granting of bonds by Appearand Heirs, whereupon apprising or adjudication may follow in prejudice of the defunct's debts.” By this Act it is declared,—“That if any apparent heir shall grant bond whereupon any adjudications or apprisings shall be deduced to their own behoof, or that the said apprisings or adjudications shall return before or after the expiry of legal reversions in the persons of the said apparent heirs, or any to their behoof, in either of these cases the said apprisings and adjudications shall noways defend them against their predecessor's creditors, but that they shall be liable as behaving themselves as heirs to their predecessors, by intromission with the rents of their estates so adjudged and apprised, nor shall it be lawful to them to renounce to be heirs after such intromission.” —*Act of Sederunt, February 28, 1662*.

3. The mode of entering to an ancestor's estate by means of an adjudication on a trust-bond, is recognised in the Act 1695, c. 24, entituled, “Act for Obviating Frauds of Appearand Heirs.” This Act declares,—“That if any man shall hereafter have served himself heir, or by adjudication on his own bond, shall hereafter succeed, not to his immediate ancestor, but to one remoter, as passing

by his father to his goodsire, or the like; then, and in that case, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in the possession of the lands and estate, to which he is served, for the space of three years, and that in so far as may extend to the value of the said lands and estate, and no farther, deducting the debts already paid." The same Act declares,—“That if any apparent heir for hereafter, shall, without being lawfully served or entered heir, either enter or possess his predecessor's estate, or any part thereof, or shall purchase, by himself, or any other to his behoof, any right thereto, or any legal diligence or other right affecting the same, whether redeemable or irredeemable, otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat, without any collusion, his foresaid possession or purchase shall be repute a behaviour as heir, and a sufficient passive title to make him represent his predecessor universally, and to be liable for all his debts and deeds, siclike as if the said apparent heir, possessing or purchasing, were lawfully served heir to his predecessor.”

4. “The other ordinary mem-

ber of behaving as heir, is by intromission with the rents of lands or teinds, whereunto the defunct had right by infeftment, or entering into possession of those rents and teinds, or tacks, unto which the apparent heir would succeed, which is the most direct behaviour as heir, and is only competent against such persons as might be heirs, in that whereunto they immix themselves. There are many defences which use to be proponed against this species of behaviour. As, *first*, It was an ordinary custom to shun this passive title, that the apparent heir granted a bond of purpose to adjudge the defunct's right, upon the apparent heir's renunciation, and then take right to the adjudication, till the Lords by an Act of Sederunt did declare, that if apparent heirs should, in time coming, take right to any apprising or adjudication of their predecessor's rights for their own debts, and did possess thereby, whether before or after expiring of the legal, they should be liable as behaving as heirs; and therefore no defence for such rights will be sustained, albeit it were a true debt of the apparent heirs, and not a simulate bond granted of design to adjudge or apprise.”—*Stair*, 3, 6, 13, 14.

An Apparent Heir may make up a Title to his Ancestor's Estate by means of a Trust-Adjudication, although his right to be Heir is disputed, and although the Estate sought to be Adjudged is held under the fetters of an Entail.

CRAIGIE v. KER.

IN a competition of brieves between Sir James Norcliffe Innes and Brigadier-General Ker, the Court remitted to the macers, with this instruction,—“ That they prefer the claimant, Sir James Norcliffe Innes, heir-male of the body of Lady Margaret Ker, in the foresaid competition of brieves relative to the estates and honours of the family of Roxburgh, and to dismiss the brieve of Brigadier-General Ker.”

On advising a reclaiming petition with answers, the Court “ Remitted of new to the macers, with this instruction, That they prefer the heir-male of the body of Lady Margaret Ker, in the foresaid competition of brieves relative to the estates of the family of Roxburgh, on his proving his propinquity ; and, in that event, to dismiss the brieve at the instance of Brigadier-General Ker ; and, with these explanations, they refuse the desire of the petition, and adhere to the interlocutor reclaimed against.”

On the day after this interlocutor was pronounced, Sir James Norcliffe Innes attempted to complete his service. But Mr. Bellendene Ker appeared in it, and objected, that he had intimated a petition of appeal to the House of Lords, and that it was therefore impossible for the service to proceed. The question arising on this objection was reported to the Court by one of the Lords assessors. The Court, in respect of the said appeal, remitted to the macers, with this instruction,—“ That they suspend, *in hoc statu*, farther proceedings in the said service.”

General Ker also intimated to Sir James Norcliffe Innes a petition of appeal to the House of Lords, against the interlocutor July 7, 1807. Sir James had previously granted to Robert Craigie and James Horne a trust-bond for £1,500,000. Upon this bond they charged him to enter heir in general and in special to the late Duke of Roxburgh, and his predecessor, Duke

CRAIGIE
v.
KER.
1808.

John, in the estate of Roxburgh. On the expiration of the days of charge, they raised a summons against him for an adjudication of the estate in payment of the sum contained in the bond.

The Lord Ordinary ordered intimation of the process to be made in common form. General Ker and Mr. Bellendene Ker then came forward as defenders in the process of adjudication, by representations against this interlocutor. The Lord Ordinary
Dec. 15, 1807. reported the case. The Court appointed a hearing in presence. On hearing counsel, the Court "Remitted to the Lord Ordinary to repel the objections, to call the case within an hour, and to decern in the adjudication." The Lord Ordinary accordingly called the cause the same day, and adjudged, decerned, and declared in terms of the libel.

Against this interlocutor General Ker reclaimed.

ARGUMENT FOR
GENERAL KER.

PLEADED FOR GENERAL KER.—The interlocutor of July 7, 1807, is now under appeal. Sir James Innes cannot therefore proceed with his service pending the appeal. As little can he make up a title by another form. If he is allowed to make up a title by adjudication, he just carries into execution by a different process that interlocutor which is now under appeal.

The adjudication cannot proceed, because the right of Sir James Innes, the truster, as heir, is *sub judice*. No instance can be produced of an adjudication of this sort being attempted in such a situation. The Acts of Parliament 1540, c. 106, and 1621, c. 27 ; Act of Sederunt, February 28, 1662 ; and Act of Parliament, 1695, c. 24, all speak of heritors, or apparent heirs, as the persons who may be charged to enter, evidently regarding them as persons whose right to enter was clear. In the same way, Lord Stair and Lord Bankton speak of this form as equivalent to service, and, of course, requiring a similar right in the heir. In short, the person who is charged to enter, is presumed to have served. But how can a person be charged to enter, and be held to have served, who cannot serve, because his right as heir is *sub judice* ? If it be said, that he is not presumed to have served, then he is at least presumed to have wrongously refused to serve ; but neither is there any room for this presumption.

The case of *Beveridge v. Coutts and Crawford*, July 10, 1793, was decided on the ground, that the heir making up a title by adjudication, was entitled to have served. See Observations on the Bench in that case. Indeed, if persons notoriously destitute of right to serve were entitled to make up a title by adjudication, then anybody who please, even a perfect stranger, might make up such a title.

CRAIGIE
v.
KER.
1808.

Even if Sir James Innes was the undoubted heir, yet, as the estate is entailed, General Ker, who is at least a subsequent heir of entail, has a right to prevent a trust-adjudication of it, since the clauses of the entail render this mode of making up a title inapplicable to an entailed estate. It is impossible to adjudge such an estate, because by the clauses in the entail, all contractions of debt for which it may be adjudged, are prohibited, voided, and made grounds of forfeiture.

The necessary and ultimate effect of the trust-adjudication, if completed, must be contrary to the entail. The entail provides, that there shall be a regular transmission of the proper fee of the estate to a certain order of substitutes. But by the proposed operation, a new right must be created different from the original fee. Two persons are introduced who have no connexion with the estate. They may complete their title by sasine, and then sell. A title by means of a trust-adjudication is only allowed to be adopted by an acknowledged apparent heir, but not where there are competing heirs.

PLEADED FOR THE ADJUDGERS.—The present process is not calculated to carry into execution any decree appealed from. The interlocutors appealed relate solely to the service ; and in consequence of the appeal, the service does not proceed. An appeal or a decree against a claimant, in a competition of creditors who used one form of diligence to which there was objection, would not prevent him from using another form to which there was no objection. A competition of rights of succession is in a similar position.

ARGUMENT FOR
ADJUDGERS.

A process of trust-adjudication, so far from requiring a clear and undisputed right in the person using it, is the ordinary form of making up a title in doubtful cases. It is a mode by which the alleged heir merely vests in him the right he truly is

CRAIGIE
v.
KEE.
1808.

entitled to, whatever it may be, leaving the nature of it to be cleared by future discussion, and in which he absolutely avoids all interference with the claims of other people. If it turns out that they have a preferable claim to his, this process goes for nothing, and can do no harm to anybody. If his right turns out preferable, he has the advantage of having made up a title without being prevented by a claim which turns out to be ill-founded. The power of doing this arises from the nature of an adjudication, in which decree is always granted *periculo petentis*.

An ordinary adjudication transfers to the creditor whatever right the debtor has in him, and no more ; and, in the same way, an adjudication on a charge to enter heir, conveys to the creditor whatever right the debtor is truly entitled to enter to, and no more. A trust-adjudication on a charge to enter, is in the same situation as any other adjudication on a charge, and, therefore, can convey to the trustee, and ultimately to the truster, no more than he is really entitled to. When the decree of adjudication is obtained, and when a claim of possession is made, then, and not till then, the rights of third parties come into question. The only objection to giving decree in this process, if any can be admitted, must be, as in other adjudications, the production of an unquestionable title instantly verified.

This view of a trust-adjudication has uniformly been adopted in the law. It is a mistake to say, that it is founded on a presumption of service having taken place. It is founded on the very reverse, as shewn by the Acts 1540 and 1621. The effects of it are similar to service, in giving an active title ; but that title is merely tentative ; and it does not become a passive title till followed by possession, so that it is safe and innocent as to all parties concerned. It has on that account been resorted to for a long time past, as the ordinary title for trying questions of disputed succession, but it never was identified with service, which is a complete title at once.

All ideas of danger resulting from the proposed mode of making up a title are erroneous. The adjudication, till infestment is taken upon it, is essentially qualified by the back-bond, and a conveyance of it from the trustees to Sir James Innes is ready

to be signed the moment it is obtained, so that all danger from breach of trust on their part is out of the question. The right of the trustees too is essentially qualified by the conditions of the entail which affect the right of succession in Sir James himself, from whom their right is derived, so that it is impossible for them to make any use of it that is contrary to the entail.

CRAIGIE
&
KERR.
1808.

The Court, by a Majority of nine to six, Adhered to the Interlocutor of the Lord Ordinary.

JUDGMENT.
Jan. 19, 1808.

In the Faculty Report it is stated, "The majority of the Court adopted the arguments of the pursuers; and several Judges particularly expressed their opinion, that the adjudication must pass *periculo petentis*, and could be of no prejudice whatever to the other claimants of the estate, or the heirs of entail, since it could not possibly do more than supply the want of the maxim, *mortuus sasiit vivum*, and transmit to Sir James his right to the estate such as it truly was, and would turn out to be, when the truth should be discovered by the judgment of the House of Lords, provided he had any right at all; and that, if he had no right, this adjudication would go for nothing. That even if Sir James Norcliffe Innes should take charter and sasine on the adjudication, that could make no difference. His title would still be of the same qualified nature, *i.e.*, a mere tentative title; and this qualification would affect all conveyances he could make to third parties in any form whatever."

OPINIONS.
Faculty Re-
ports.

On the Session Papers in the cause, LORD PRESIDENT CAMPBELL has written,—“Adjudication upon trust-bond. This mode of making up titles recognised by various Statutes, Act 1621, c. 27, Act 1695, c. 24, &c. It confers a safe, active, or tentative title, but till followed by possession, or by ascertaining the right, is not a passive title. All adjudications are taken *periculo petentis*, and this in particular. It cannot be stopped by any competing parties, but must proceed *valeat quantum*, reserving all objections *contra executionem*.”

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

“The case of Hepburn, as stated in the Minute, is misunderstood. The adjudication on trust-bond, though remaining personal and incomplete, was held as a good title to transmit the estate to the heir-at-law of the truster, in competition with the heir of the former investiture, without regard to the sum in the

CRAIGIE
v.
KER.
1808.

bond, fictitious or real. It was considered as a mere title, not to the debt, as there was truly no debt, but to the estate, and not redeemable except by the heir in possession. It became complete by possession, both as an active and a passive title, and the right of redemption became extinguished *confusione*. Such a title is perfectly safe and innocent, because it goes for nothing, unless the party prevails in making out his right. It is then only that the claim of terce, or any other claim by him or any other in his right, can have effect, for otherwise it goes for nothing.

“ The case of Rose, 26th July, 1790, is not applicable, and, indeed, is not accurately reported, for the ground of the decision was, that the estate truly belonged to Hugh Rose, the husband, and there was a good feudal investiture in the person of his trustee. He could not defraud his wife of her terce, by putting the estate in the person of a trustee. The case of Physgill is equally inapplicable to the case of a trust-bond.

“ The sole question here is, What is the effect of the appeal? The Court found that it hung up the service, because the competition of brieves was supposed to be virtually conjoined with the reduction. But the process of adjudication was not then before the Court, and could not be prevented any more than a precept of *clare constat* could be, or expeding an infetment upon a charter already obtained.

“ As to the entail, the adjudger is willing to run the risk, and it is not competent for the other competitor to prevent him. He may follow the same course if he pleases.”

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

On the Reclaiming Petition for General Ker, the LORD PRESIDENT has again written,—“ Adjudication upon Trust-Bond—Interlocutor right. See former note. The reconveyance under all the claims of the entail puts the matter beyond doubt as to any challenge from the subsequent heirs of entail. General Ker has two characters in him, a competing heir, and a succeeding heir of entail. In last character he is not hurt. In former he may follow the same course, which is vesting a mere conditional right depending on the final issue of the competition.

“ As to Mr. Bellendene Ker. He is not a competing heir, but a party claiming under a preferable right. It is of no consequence to him what title is made up in pursuer, but of consequence

that there should be some title. No actual creditor can be prevented from adjudging. Even a pretended creditor, to whom nothing may be found due in the end, must be allowed to have his decree of adjudication *periculo petentis*, reserving all objections. A trust creditor the same. Such titles used in *M'Lean v. Duke of Argyle*, *Ross of Pitcalny v. Sir John Lockhart Ross*.

CRAIGIE
v.
KER.
1808.

“ It is not necessary perhaps for the purpose of a conventional provision, to go farther than the extract of the decree of adjudication, which will vest a personal title of adjudication, at least to the extent of the supposed debt, which, though it becomes, to the extent of the provision, a true debt, who can redeem it but the heir at the time, and by paying what is truly due under the powers of the entail ?”

1. In the case of *GORDON v. FORBES*, February 7, 1695, an apparent heir granted a bond to a party who, having charged him to enter heir, and having obtained a decree *cognitionis causa*, raised an adjudication of his ancestor's estate. Compareance was made for the party in possession of the estate, who objected that the lands had belonged immemorially to him and his predecessors, and that he had already raised a declarator to that effect. He denied that the lands had ever belonged to the ancestor of the apparent heir, and that the pursuer was nearest in blood. The pursuer PLEADED,—Adjudications are *judicia summaria*, and ought not to be stopped on averments that require probation. The form is to discern and reserve all such defences *contra executionem*. The defender PLEADED,—It is true the Lords will not stop adjudication on every allegation where the pursuer is a true creditor, and the apparent heir's contingency in blood is notour, and there is a general *fama* that the land once belonged to his family. Where none of these circumstances appear, and where there is no striving for diligence, but where it is the first adjudication, and no *periculum in moru*, the Lords will not easily pass such adjudications. LORD FOUNTAINHALL observes,—“ The Lords found, That where adjudications are sought on apparent heirs' bonds, and where there is no notoriety of their predecessors having been heritors of that land, and where there is no concurrence of creditors striving for diligence, there ought to be no decree of adjudication till they give some document that they once had right to the

land craved to be adjudged, by a sasine, or some other evident, and that he had a contingency in blood."—*Fountainhall's Decisions*, vol. ii. p. 241.

2. In *ERSKINE v. KENNEDY*, June 19, 1746, it was objected by the party in possession of the land sought to be adjudged, that the granter of the bond on which the adjudication proceeded, was not apparent heir in the lands, and that the lands were not descendible to heirs-male. The Court remitted to the Lord Ordinary to inquire how the lands were destined. LORD ELCHIES observes,—“One pursuing an adjudication on the apparent heirs-male gratuitous bond, in order to carry the estate, the defender being in possession on a title of property, was found to have right to object that the granter of the bond was not apparent heir in these lands, and that they were not descendible to heirs-male, and we remitted to the Lord Ordinary to inquire how the lands were provided.”—*Elchies' Decisions*, vol. i. *Adjudication*.

3. In the case of *BEVERIDGE v. COUTTS*, July 10, 1793, an adjudication on a trust-bond granted by an apparent heir for the purpose of making up a title in order to reduce a disposition of his ancestor, was held to be competent, although the disponent was infest. Colonel Crawford had conveyed the estate of Crawfordland to Thomas Coutts, but the disposition having been granted on deathbed, the heir-at-law proposed to bring a reduction of it. As a preparatory

step, she granted a trust-bond to the pursuer, upon which, after raising letters of general and special charge against her, and after Mr. Coutts had taken infestment on the disposition in his favour, he brought a process of adjudication, in which Mr. Coutts appeared, and PLEADED,—The lands in question are not in *hereditate jacente* of the predecessor of the heir-at-law. Mrs. Crawford, therefore, cannot be served heir-at-law to him or them, nor can her creditors lead an adjudication against them. She is entitled to bring a reduction of the disposition and infestment by which she is excluded, and that faculty her creditors may adjudge, but they cannot adjudge the estate in which another party is infest.

4. The heir-at-law PLEADED,—The disponent, Mr. Coutts, cannot be prejudiced by the adjudication, as the estate will be adjudged *tantum et tale*, as it stands in the person of the heir-at-law. Any settlement which the heir-at-law might make in the meantime would be nugatory, if she should die before completing his titles by service, or by the mode now proposed. The Court adjudged. It was observed on the Bench,—“As Mrs. Crawford is entitled to serve heir to her predecessor, the adjudication must be equally competent, and she ought to be at liberty to vest such a title in her person as may enable her to make a settlement.”

5. In the case of *Moveable succession*, an indulgence in making up a title is allowed to the next of kin, although their right to be ex-

ecutors is disputed, similar to that allowed to an apparent heir in heritage. The object of the indulgence is to allow the right of the next of kin to vest in them, so as to enable them to transmit it, in the event of their dying before the final issue of the competition in their favour. In *ROSS v. AGLIANBY*, January 22, 1793, the next of kin of a party applied to be decerned executors-dative *qua* nearest in kin. The deceased had left a deed of settlement containing a nomination of executors. This deed had been reduced by the Court of Session, but the executor named in it had entered an appeal against the judgment. The executor objected to an edict in favour of the next of kin, on the ground that no person ought to be confirmed during the dependence of the appeal. The Commissary "Delayed giving any decision on the edict till discussing of said appeal."

6. The next of kin having advocated the judgment, the Lord Ordinary refused the bill of advocacy. The advocates then reclaimed to the Court, and stated, that as one of their number was 76 years of age, and in a valetudi-

nary state of health, there was much reason to apprehend that any delay of the confirmation might have the effect of altering the course of succession, and that although the appeal might stop the execution of the decree of reduction, yet it could not restore the deeds reduced, which were *in hoc statu* to be considered as nonentities, and therefore insufficient to operate as a bar to the confirmation. The Court altered the interlocutor of the Lord Ordinary, and granted the prayer of the petition, for the purpose of vesting a title, upon the petitioners agreeing not to intromit till the appeal should be discussed. On the Session Papers, LORD PRESIDENT CAMPBELL has written,—“Effect of an appeal as to a decree of Court of Session reducing deeds of settlement, to stop a confirmation of the nearest of kin as executors. They ought to be allowed to proceed to complete their title, to the effect of vesting the right, and enabling them to transmit to their own nearest in kin, if they should happen to die in the meantime.”—*MS. Notes, Sir Islay Campbell's Session Papers.*

An Adjudication in Implement of a Trust-Disposition granted by an Apparent Heir is incompetent as a mode of Entry to his Ancestor's Estate.

DUNLOP v. COCHRANE.

March 31, 1824. **NARRATIVE.** IN 1719, Alexander Inglis executed an entail of his estate of Murdostown in favour of Alexander Hamilton and a series of substitutes. In virtue of this deed, Alexander Hamilton acquired right to the estate, and possessed it till 1783, when he died, and was succeeded by his younger brother, Gavin Hamilton. On the death of Gavin Hamilton, in 1798, he was succeeded by his younger brother, General James Hamilton, who being advised that the entail was ineffectual, executed a new entail in favour of Colonel James Hamilton and his heirs; whom failing, Sir Alexander Cochrane. General Hamilton died in 1803, and was succeeded under the new entail by Colonel James Hamilton, who fell at Waterloo in 1815, leaving no issue. Sir Alexander Cochrane then took possession of the lands, and obtained himself served and retoured heir of tailzie and provision to Colonel James Hamilton under the new entail.

Before Sir Alexander Cochrane was infet, Dr. David Ramsay, alleging that he was heir-of-line in general of Alexander Inglis, who had executed the original entail, granted in 1818, an *ex facie* absolute disposition of the estate of Murdostown in favour of his law agent, Mr. George Dunlop, and obtained at the same time from him a back-bond, declaring that he held the estate in trust for his behoof. Dr. Ramsay then took out a brieve, and obtained himself served heir-of-line in general of Alexander Inglis. Mr. Dunlop then charged Dr. Ramsay to enter heir to Alexander Inglis, and thereafter brought an adjudication in implement of the disposition in his favour. In this adjudication, the Lord Ordinary decerned in absence. Appearance was then made for Sir Alexander Cochrane, and he opposed the adjudication.

**ARGUMENT FOR
HEIR IN POS-
SESSION.**

PLEADED FOR HEIR IN POSSESSION.—According to the principle of the English law *MORTUUS SASIT VIVUM*. The investi-

ture of the ancestor passes *ipso facto* to the legal heir, and gives him an instant right and title to vindicate the estate from any other person, and to convey or burden it as he pleases. The law of Scotland, on the other hand, denies active effect to a right of succession in heritage, until the right has been legally ascertained and clothed with a feudal investiture. In the exercise of its *nobile officium*, the Court has made certain equitable stretches of its authority, with the view of alleviating the practical hardships which would attend a strict adherence to this rule of law.

DUNLOP
v.
COCHRANE.
1824.

From an early period, it has been the practice of the Court to assist a just and onerous creditor to counteract the fraud of a debtor lying out unentered to his heritage, by allowing him to deduce an adjudication against his debtor's estate. It was a great stretch of the authority of the Court, when it permitted this practice to be made the pretext of a fictitious proceeding, at the instance of persons conceiving themselves to be heirs in apparenancy, to estates already in the feudal possession of another. This has, however, been allowed to be done by means of fictitious bonds granted to trustees for the purpose of creating what is called a tentative title, or a title by means of which they might be in a condition to challenge an existing infestment in the estate.

The adjudication in question is not analogous to those which have been introduced, either by statute or practice, for the security of creditors. The ground of the present adjudication is not a fictitious bond creating a fictitious creditor, but a fictitious disposition of the entire and absolute property of the estate. Under this disposition the fictitious disponent is seeking a feudal investiture by means of an adjudication in implement. If an investiture is obtained, it must enter the public records, and there stand as an absolute and unqualified right of property in the estate.

In granting a bond acknowledging a debt, the granter does nothing directly but place himself gratuitously under an obligation, such as every one has it in his power to contract. The subsequent proceedings on the part of the nominal creditor are no more than ordinary steps of diligence, which every creditor would be entitled to employ, and which those who are the pre-

DUNLOP
v.
COCHRANE.
1824.

sent possessors of the estate intended to be affected, have no direct and instant means of preventing. In the mode of proceeding by trust-disposition, there is on the part of the granter a direct and undisguised pretension to the exercise of a right which belongs only to him who is the true owner of the estate. It is a direct exercise of the very right which is meant to be the subject of controversy, and the right which is conveyed to the fictitious donee presupposes the validity of the very title which is the subject of dispute.

Adjudications upon deeds granted by an heir are matters of equitable indulgence. They ought therefore to be conducted in the manner least injurious to the party in the possession of the estate. In pursuance of this view, they ought to be allowed on trust-bonds only, and not upon trust-dispositions. A tentative title made up as a trust-bond is, from its form, a security only on the estate. It does not *ex facie* deprive the existing proprietor of his own infeftment. And, in case of his death, it does not hinder his heir from entering to him as last infeft. A title, however, made up by adjudication in implement, *ex facie* wholly divests the existing proprietor, and, in case of death, renders it impossible for the heir to enter to him as last infeft. The evils resulting from allowing the one mode of making up a title are obviously greater than those resulting from allowing the other. As the former mode is now recognised in practice, and can answer all necessary purposes, the other mode ought not to be sustained.

No infeftment, at least, ought to be allowed upon an adjudication proceeding upon a trust-disposition, until the question of right is finally determined. Infeftment must injure the credit of the holder of the estate. It may be joined to possession illegally obtained, and prejudice the true owner of the estate in maintaining or recovering possession. The present action of adjudication ought, therefore, to be dismissed. At least it ought to be sisted until the question of right between the parties shall have been decided ; or if an adjudication shall be allowed to pass, it ought to be so qualified, that no infeftment shall follow upon it till the question of right shall have been decided.

ARGUMENT
FOR TRUST-
DISPONEE.

PLEADED FOR THE TRUST-DISPONEE.—If an heir were obliged

to wait until his title were regularly established by law, great inconvenience might be sustained, as he might be prevented by death from granting any deed affecting the estate, although it should afterwards be found that he was the true owner of it. Two methods have been recognised in the law of Scotland, for the purpose of vesting an apparent heir with a title to his ancestor's land, where his right was disputed. One is by the heir granting a bond to a confidential person for a sum of money, upon which he is charged to enter heir to the subject in competition. An adjudication is then brought at the instance of the grantee in the bond. The other method is by the heir executing a disposition of the subject in dispute to a confidential person, who, as in the former case, charges the granter to enter, and then leads an adjudication in implement.

DUNLOP
v.
COCHRANE.
1824.

These two modes of making up a tentative title, are, in one respect, different in form, but in no respect different in substance as affecting the rights and interests of either of the parties engaged in the competition. Whether the adjudication proceeds on a disposition or on a bond, it will be wholly unavailing to the adjudger or his constituent, unless he can establish in the competition that he has a separate title to the property which is preferable to that of his opponent. If the opponent happens to be in possession, the adjudication, whether led in the one way or in the other, can never have the effect of disturbing him, unless confirmed by a judgment on the point of right. In either case, the adjudication is a measure *innocue utilitatis*, in regard that it gives the claimant a title to try the question of right, and enables him to make settlements, which will be sustained if the property should be found to be his. On the other hand, the opposing party, whether he possesses or not, can qualify no injury whatever. The right adjudged can be no more than the right *tantum et tale*, as it stands in the party adjudged from ; and if it turn out in the course of the competition that he has no good right to the property of the land, the adjudication goes for nothing.

Infestment is always contemplated as a necessary consequence of an adjudication. According to feudal principles, it seems a contradiction to hold, that the Court is to pronounce a decree of adjudication against a particular estate, and in the

- DUNLOP**
v.
COCHRANE. same decree to deny effect to the adjudication by preventing infestment.
1824.
First Interlocutor of Court. June 15, 1819. The Lords "Adhered to the Lord Ordinary's interlocutor, and of new adjudged, decerned, and declared in terms of the libel."
- Second Interlocutor of Court. July 14, 1820. On a reclaiming petition by Sir Alexander Cochrane, the Lords "Altered their former interlocutor and that of the Lord Ordinary reclaimed against. Dismissed the process of adjudication, assoilzied from the conclusions of the same, and decerned."
- OPINIONS.**
Faculty Reports. In the Faculty Reports it is stated,—“A majority of the Court were of opinion that it would be harsh to allow infestment to proceed upon the adjudication. With regard to the alleged practice, they thought that if it existed, it was improper, and that the sooner it was checked the better.”
- Journals of the House of Lords. March 31, 1824. The pursuer having appealed to the House of Lords, LORD CHANCELLOR ELDON presiding,—“It was ordered and adjudged, that the appeal be dismissed, and that the interlocutors complained of be affirmed.”

Where an Apparent Heir, in virtue of an Adjudication proceeding on a Trust-Bond granted by himself, challenges a real right to the Lands which had belonged to his predecessor, and fails, a judgment of Absolvitor in the defender's favour is Res Judicata against a second Apparent Heir making up a similar title in the same character, and challenging the right upon the same ground.

I.—GORDON v. OGILVIE.

- Feb. 17, 1761. **NARRATIVE.** IN 1709, Robert Middleton settled his estate of Balbegno upon his brother-in-law John Ogilvie, and on Middleton's death in 1710, Mr. Ogilvie entered into possession of the estate, and took out a charter under the Great Seal, on which he was infest.

Elizabeth, a sister of Middleton, threatened a reduction of the deed in favour of Ogilvie, both on the ground of fraud, and also

on the ground of want of power on the part of the granter. An agreement was thereafter entered into between her and her husband Mr. Gordon, on the one part, and Mr. Ogilvie on the other, by which the former bound themselves not to quarrel Mr. Ogilvie's right, and Mr. Ogilvie, on the other hand, granted a bill for a certain sum of money.

GORDON
v.
OGILVIE.
1781.

In 1749, after the death of her husband, Elizabeth executed a revocation of this agreement, and granted a trust-bond to Mr. Alexander Gordon, who thereupon adjudged the estate of Balbegno, and upon that adjudication as a title, brought a reduction and improbation against the daughters of Mr. Ogilvie, challenging their rights to that estate. The defenders pleaded that the obligation granted by Elizabeth was a sufficient bar to her insisting in the action.

LORD ELCHIES, Ordinary, found,—“That the pursuer was July 11, 1750. barred by her said obligation from quarrelling the defender's right, without prejudice to her to reduce that obligation, as extorted *vi aut metu*, or on any other ground in law.” To this interlocutor the Court, upon a reclaiming petition, adhered.

Elizabeth having died in 1753, her son, the pursuer, granted a new trust-bond to Mr. Gordon, who thereupon charged the pursuer to enter heir to Andrew Middleton his grandfather, and Robert his uncle, in the estate of Balbegno, and thereafter brought a process of adjudication. In this process the defender appeared, and objected that she was safe from any challenge on the part of Elizabeth or her descendants, in respect of the obligation granted by her, and also of the decree of the Court, in the action at her instance.

PLEADED FOR THE PURSUER.—There was no proper title, ARGUMENT FOR PURSUER. either real or personal, in Elizabeth, which affected the estate of Balbegno. Her only title was an adjudication led by her trustee, for the purpose of trying her right to the estate, and it fell to the ground, when her process founded on it was dismissed upon the personal objection pleaded against her. The pursuer does not represent Elizabeth under that title, or in any way whatever; and, therefore, though the judgment pronounced against her might bar her heirs, it cannot affect him.

The origin of adjudications upon trust-bonds, and a consider-

GORDON
v.
OGILVIE.
1761.

ation of the motives which introduced them, and the effects which they were intended to produce, supports the plea of the pursuer. The utmost care and anxiety was anciently used to prevent the intermeddling of apparent heirs with their predecessor's estates, without being liable for the whole debts. If they made up titles by service, they became unquestionably liable. If they took possession without service, they became also liable upon the passive title of *gestio pro herede*; and if they purchased any right to the estate, otherwise than at a public sale, it was likewise declared a passive title by the Act 1695. By this severity of the law, if there was any doubt as to the circumstances of the estate, it became extremely hazardous for the heir to have anything to do with it; and if a stranger had unjustly taken possession, it was dangerous to establish a title for the purpose of challenging his right.

To remedy this hard situation of apparent heirs, adjudications upon trust-bonds were devised. An adjudication upon a trust-bond is a fiction of the law, taken from the example of real and lawful creditors. A real creditor might pursue a reduction of the defender's titles upon the head of circumvention, lesion, or fraud, and could force the defender to produce his titles to the estate. If this creditor failed in his action on account of any objection personal to himself, it would not hinder another creditor from pursuing an action of the same kind upon his separate debt. In the same manner, adjudications upon trust-bonds are introduced as a title to carry on such action to the extent of the sum in the trust-bond, and if the adjudger shall be cast in his action upon account of some personal objection, that will not hinder another adjudger upon a trust-bond, totally unconnected with the former, from pursuing another action of reduction, without regard to the former adjudication. The fiction of the law can have no stronger effect than an adjudication upon a real debt. *NE FICTIO PLUS VALEAT IN CASU FICTO QUAM VERITAS IN CASU VERO.*

The pursuer's mother never was in the feudal right of the lands. That right may, therefore, be taken up without the burden of her adjudication, which was only led to afford a title to bring a tentative process *ad tentandas vires hereditatis*. The adjudication was never conveyed to her by the trustees. She

was cast in her action upon an objection merely personal to herself; and, therefore, the adjudication fell to the ground, and can affect no person who does not represent her. The pursuer does not represent his mother. He has taken up the estate out of the *hæreditas jacens* of his grandfather and uncle, passing by his mother. Her deeds, therefore, cannot affect him, though he be her son, because the representation cannot be by bare existence, but must be established by a service, or some other form known in law. The decree against Elizabeth was not pronounced on the merits of the cause, but upon the obligation she had granted, which was an objection personal to herself, and with which the pursuer has no concern. It must, therefore, be still competent to him to insist in this reduction, the merits of which are as yet untouched and undetermined.

GORDON
v.
OGILVIE.
1781.

PLEADED FOR THE DEFENDER.—The pursuer's mother, with her husband's consent and advice, in return for a valuable consideration, discharged her claim or right of succession as apparent heir to her brother's estate. She afterwards made up a proper legal title to her brother's succession, by the established legal form of an adjudication upon her own bond. Her discharge, though previous in point of date to the adjudication, is sufficient and effectual to bar the pursuer from insisting upon the precise same claim which was given up and abandoned by his mother's deed. The solemn decree of *absolvitor* pronounced against the pursuer's mother, is *res judicata* against the pursuer. By that decree the defender was for ever absolved and acquitted from the claim insisted in that action. The pursuer, therefore, stands also barred under that *res judicata*. Were it otherwise, every succeeding apparent heir, *in infinitum*, might renew the suit, which is too absurd to be admitted in any court of justice.

ARGUMENT FOR
DEFENDER.

The pursuer's doctrine, with respect to the title of an adjudication upon an apparent heir's trust-bond, is new and dangerous. This method of making up titles to the lands, or other rights of a predecessor, is of a very ancient standing in our law, and has very much prevailed in practice; but it never was maintained till now that this title vests no right in the apparent heir, that it is only a fictitious title *ad tentandas vires hæreditatis*; and

TRANSMISSION OF LAND.

TRANSMISSION OF LAND.

When a land estate or other heritable right lies in *hereditate*
of the defunct, a right or disposition from the apparent
heir, who has made up no title, is illusory and ineffectual, be-
cause he has no right in his own person which can be conveyed.
The estate remains in *hereditate vacante* of the defunct, and may
be taken by the next apparent heir making up a proper title to
it. But the case is very different where the subject never was
in *hereditate vacans*, and where the predecessor himself by an
effectual deed has conveyed the estate to a stranger.
In this case the apparent heir by a service cannot carry the
subject, because he only carries whatever is in *hereditate vacans*.
Therefore, the predecessor's deed is binding and finally
conveys the real right—a right of action against his pre-
decessor in favour of the stranger.

[illegible]

claim which was discharged and extinguished by his mother's deed.

GORDON
v.
OGILVIE.
1761.

Where the estate or heritage intended to be taken by an apparent heir is not *in hæreditate jacente*, but vested in the person of a stranger by a deed of the predecessor himself, neither a general nor a special service can be used as an effectual or proper title. There is nothing to be carried except the right of action, and it would be unreasonable to lay the apparent heir under a necessity of representing his predecessor by service for the sake of a right which might carry no inheritance. The proper method is to make up a safe title to the succession, or rather to the right of action for the recovery of the succession, by an adjudication upon a trust-bond.

According to the pursuer, an adjudication upon a trust-bond is a good title to carry on an action of reduction. It disappears, however, as a proper title, if the defender be assoilzied. If the pursuer prevail, it is a good title upon which he can enjoy and convey the estate. If, however, the defender prevail, the decree in his favour is illusory and good for nothing, for the next apparent heir may take up the same title, fight the battle over again, and if he is unsuccessful, there seems to be nothing to prevent every succeeding apparent heir *in sempiternum* to renew the suit.

This doctrine is too gross to be maintained. If an adjudication upon a trust-bond be a sufficient title to carry on a reduction of the predecessor's deed, it must necessarily follow that the pursuer, who has a title to insist in the action, can effectually discharge the action, and that such discharge will for ever extinguish the right. A decree of *absolvitor* in the action will also have the same effect. It is inconsistent with justice that a party should be allowed to insist in an action which he cannot transact or discharge, or in which an absolvitor will not secure the defender from being ever disquieted again on account of the claim insisted in. The proper test of a pursuer's title to sue is, If an absolvitor will secure the defender. Unless that is the case, his title to pursue is insufficient, and the Court have done wrong in sustaining by constant practice the title of an adjudication on an apparent heir's bond, unless it be understood that such a title will enable him to discharge the

GORDON
v.
OGILVIE.
1761.

action effectually. The practice is evidence that the title is sufficient. It must necessarily follow, therefore, that a discharge of the action, or a final absolvitor by the Court, is an effectual extinction of the claim, as much as if the apparent heir had made up his titles by the most formal manner by service, and discharged the action, or succumbed by an absolvitor of the Court.

First Interlocu-
tor of Court.
Nov. 26, 1760.

Upon report of LORD EDGEFIELD, the Lords found it proved, "That the defenders and their father, Mr. John Ogilvie, have been in possession of the lands and estate of Balbegno, by virtue of charter and sasine, upwards of forty years, but repel the defence of prescription, in respect of the interruption by the process of reduction and improbation raised at the instance of Gordon of Whiteley, on the trust-bond granted to him by Elizabeth Middleton, the pursuer's mother, in the year 1750. The Lords Sustain the defence of *res judicata* proponed for the defenders, in respect of the decret absolvitor pronounced in the said process of reduction and improbation in their favour ; also Sustain the defence, That the pursuer, John Gordon, represents his father Charles Gordon of Achanachie, and is thereby barred from challenging the deed of renunciation of the estate of Balbegno, dated the 26th day of May 1713, granted by the said Elizabeth Middleton and the said Charles Gordon ; and, therefore, find the defenders have produced sufficient to exclude the pursuer's title ; and assoilzie, and decern."

Second Interlo-
cutor of Court.
Feb. 17, 1761.

On advising a reclaiming petition for the pursuer, the Lords "Sustained the defence founded upon the transaction with Elizabeth Middleton, in the year 1713, and decree absolvitor pronounced thereon in favour of the defender, in the year 1753, and adhered to the points in the former interlocutor reclaimed against."

Kames' Select
Decisions, p.
238.

LORD KAMES, in his Select Decisions, observes,—“ It occurred at advising, that if the reduction had been brought before Ogilvie was infeft, the pursuer could have no title without being served heir in special to the land, remaining still in *hereditate jacente* of Andrew. But that Ogilvie's infeftment, which *funditus* denuded Andrew of the property, made the case very different. In this case, Elizabeth was entitled in her own right to challenge the settlement, which will thus appear. A naked

disponee, who has obtained his right by fraud and circumvention, is bound to repair the hurt he has done, and to that end, a simple renunciation will not avail where the disponee stands infest. And therefore he must, in order for reparation, reconvey the estate to the disponer, and if the disponer be dead, he must convey it to his heir. This entitles the heir to demand restitution of the estate. It entitles him also, if the fraud and circumvention be controverted, to bring a process, or to make a transaction as *de re dubia*. If the estate be restored to him, he may dispose of it at his pleasure ; and, for the same reason, if he agree for a valuable consideration to ratify the purchaser's right, the ratification must stand good against all the world."

GORDON
v.
OGILVIE.
1761.

The pursuer having appealed, LORD HENLEY, Chancellor, presiding,—“ It was Ordered and Adjudged that the said petition and appeal be, and is hereby discharged this House, and the said interlocutors therein complained be, and the same are hereby confirmed.”

House of Lords'
Journals.
Mar. 22, 1762.

II.—RUTHERFURD v. NISBETTS' TRUSTEES.

In 1749, Sir Alexander Nisbett settled the estate of Dean on the heirs-male of his own body, and on the bodies of his daughters ; whom failing, on his nephew Henry Rutherford, and the heirs-male of his body. On the death of Sir Alexander, his eldest son Sir Henry made up titles to his father, but died without issue. His second son Sir John was then served heir of provision under the investiture 1749, and was infest. In 1776 Sir John died, and in the event of his being held to have left no lawful issue male, the succession opened to the heir-male of the body of Henry Rutherford, the party named in the investiture.

NARRATIVE.

In 1781, Sir John Nisbett, son of the preceding Sir John, obtained a special service, and made up titles to the estate as heir-male of provision to his father. In 1790, John Rutherford, grandfather of the pursuer, and son and heir of Henry Rutherford, the party named in the investiture, granted a trust-bond

RUTHERFURD
v.
NISBETTS'
TRUSTEES.
1832.

for £10,000 to John Edgar, his father-in-law, who charged him to enter heir-male of provision in special to the deceased Sir John Nisbett, and thereupon obtained a decree of adjudication. Having extracted this decree, he raised an action of reduction and declarator against the then Sir John Nisbett, for setting aside his special service and infeftment, on the ground of his being illegitimate, and for having it declared that he had no right to the estate of Dean. In this action a proof was allowed, but the Court ultimately repelled the reasons of reduction, and assolizied.

In 1827, the second Sir John Nisbett died, having previously conveyed the estate of Dean to trustees. After Sir John's death, the pursuer, who was the grandson and nearest heir-male of line of John Rutherford, the pursuer of the former action, and as such heir of provision under the investiture of 1749, presented an appeal to the House of Lords against the judgment in the action at Edgar's instance, and praying to be allowed to sist himself as pursuer in that action. This appeal was dismissed as incompetent. The pursuer then raised the present action, setting forth his propinquity, and that he was heir of provision, entitled to succeed on the failure of the first Sir John Nisbett, son of Sir Alexander, without lawful issue male, and concluding for reduction of the service and infeftment of the second Sir John, and the deeds granted by him in favour of the defenders. The ground of reduction was, that the second Sir John Nisbett was not a legitimate son of his father. The trustees admitted the propinquity as alleged by the pursuer, and that he would have been entitled to succeed as heir of provision to the estate of Dean, had Sir John Nisbett, son of Sir Alexander, died without lawful issue male; but they pleaded, in defence to the action, that the pursuer had no title to sue, having expedie no service, and that the decree in the former action was *res judicata* against him, so as to bar the present action. The first of these defences was repelled by the Court, and cases were ordered on the question, "Whether, assuming that the pursuer did not represent his grandfather, the judgment in the action for his behoof formed *res judicata* against him?"

Nov. 12, 1830.
ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—When a landed estate is settled

in special legal form by special destination upon a series of substitutes, there is constituted a feudal *dominium*, which must open to each of the substitutes in succession, so long as substitutions are not altered by some heir in possession, who being properly and technically vested in the feudal right, is *in titulo* to make the alteration. If the heir's title is erroneously made up, even by an error merely in the service, the alteration will be ineffectual from defect of title, though the power was undoubted if the title had been correct.

RUTHERFORD
v.
NIBBETTS'
TRUSTEES.
1832.

As long as the investiture subsists, the privilege of vesting himself with the real right must arise to each successive apparent heir in his turn, along with the immediate enjoyment of certain other privileges which are accessories to the real right, and which vest *ipso jure*. Until the destination is validly altered, the next substitute takes by as good a right as an heir of entail, though he may be subjected to burdens from which an heir of entail would have been free. An apparent heir cannot renounce the succession farther than for himself. He cannot renounce to the prejudice of the succeeding heirs. He cannot bind the succeeding heirs by his ordinary contracts, except in so far as the Act 1695 has established a passive representation against him. Neither can he bind them by the contract of litiscontestation.

According to the civil law, the *exceptio rei judicatae* was pleadable against the parties to a suit, their universal representatives, and their successors in a particular subject, in regard to questions relating to that subject. The law of Scotland has adopted the rule of the civil law.

The principle on which it is extended to the case of successors in a particular subject, in regard to questions relating to that subject, though not otherwise representing their authors, is founded on the rights arising from *dominium*. The owner of the subject may convey it, burden it, and in every way affect it by his acts and deeds, and any decision regarding it in a question with him, must equally affect it, and attach to all afterwards succeeding to his right, since *nemo potest plus juris in alium transferre quam ipse habet*. But an apparent heir has no such *dominium* in the estate itself, or in the right of succession thereto, except in so far as he personally is concerned. He is

RUTHERFORD
v.
NIBBETTS'
TRUSTEES.
1882.

truly vested with no right transmissible to other heirs, or affectable by his deeds.

Each apparent heir enjoys certain rights from the fact of his standing in the relationship of apparency, but these are personal to himself, and he can only transact regarding them so far as his own interest is concerned, each heir who successively comes into the same position having similar rights arising therefrom to him. One of these rights is to pursue reduction of obstacles to his entry, but it is only as being obstacles to his own entry that he has title to pursue reduction of them, not as affecting the estate generally, or the rights of those who may subsequently attain the station he at present occupies. A decision with him, therefore, merely affects his own right and interest. The next heir takes nothing from him, and succeeds to no right which was vested in him. He comes into the relationship of apparent heir, it is true, but the rights thence arising to him arise immediately from the relationship as his own personal and independent rights, and do not fall to him from the preceding apparent heir.

In this view, there is no room here for the plea of *res judicata*. The pursuer was not the party, nor does he represent the party in the former action. Neither is he a successor in the right which was the subject in dispute, in that sense alone which can give rise to the exception, according to the principles of the civil law, and our institutional authorities. The case of *Gordon v. Ogilvie* is no precedent, for the party there was obliged to found on an action at the instance of an ancestor whom he was said not to represent, in order to elide prescription. The judgment merely was in substance, that he could not found on it to this effect, and yet not be bound by the decision pronounced in it.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE DEFENDER.—The question at issue is, What is the nature of the right which was vested in the apparent heir, who was the pursuer of the former action, and what is the true nature of the contract of *litiscontestation*, with reference to that right? No one can be compelled to join issue, or in other words, to enter into the contract of *litiscontestation*, with a party against whom he cannot obtain an effectual deci-

sion. If a defender can show that the *jus actionis* assumed by the pursuer is either in fact vested in another, or may by possibility be vested in another, he cannot be compelled to join issue with such pursuer. The reason for this is, that the party having the *jus actionis* may afterwards insist on trying the same questions with him over again. The true test of a title to pursue is, whether a decree of absolvitor, if the pursuer should fail in his action, would be an effectual determination of the question tried? Where the *jus actionis* is vested exclusively in one individual, there is only one party in existence with whom the defender can be called upon to join issue. If then a defender can be so called upon by that party, it would seem to follow necessarily, that a decree of absolvitor obtained in such an action must be conclusive against all the world.

The former action, being truly for behoof of the grandfather of the present pursuer, must be considered as if it had been actually brought in his name. Its object was the same with the present action—its conclusions were the same—the *media concludendi* were the same, and the interest was the same as that now vested in the pursuer. As apparent heir, the pursuer's grandfather was fully and exclusively vested in that very right which the pursuer now seeks to establish, and being so vested, he was *in pleno jure* to try every question regarding it.

The pursuer's grandfather might validly have renounced the right so vested in him, and *a fortiori* he was entitled to enter into the contract of litiscontestatio with reference to it. At all events being in the full and exclusive right of it, and being entitled to try the question, and having accordingly tried it, the decision in the former action must be *res judicata* against all parties claiming the same right, although they may not in other matters represent him. This is in conformity to the equitable principle on which the rule rests, of preventing an indefinite repetition of the trial of the same question, by parties successively taking up the same right. That principle was enforced in nearly similar circumstances in the case of *Gordon v. Ogilvie*.

LORD MONCREIFF found,—“That the decree of this Court of the 20th of June and 11th July 1797, of which an extract is produced, constitutes *res judicata* against the pursuer, in regard

BUTHERFORD
v.
NISBETTS'
TRUSTEES.
1882.

Interlocutor of
Lord Ordinary.

RUTHERFURD
v.
NISBETTS'
TRUSTEES.
1882.

to the object and conclusions of the present action ; Sustains the same as a title to exclude ; Finds that the defenders are not bound to produce the writs called for by the summons ; as-soilzies the defenders from the whole conclusions of the action ; Finds the defenders entitled to the expense of this part of the discussion."

Note of Lord
Ordinary.

In a Note to this Interlocutor, Lord Moncreiff observed,—“ It has been decided that the pursuer, by his propinquity, and by the destination of the estate of Dean, has a good title to insist for reduction of the service of the late Sir John Nisbett as heir-male and of provision of his father Sir John Nisbett, on the ground that he was of lawful birth—of the precept from Chancery, and the seisin which followed thereon—and of the trust-deed executed by the last Sir John. The summons concludes to have these titles reduced, and to have it found, that the pursuer is entitled to be served heir-in-special in that estate, as nearest heir-male and of provision, under the same destination to which Sir John's service related.

“ The defender refuses to satisfy the production, and produces the extract of a decree in 1797, in an action insisted in by John Edgar, as adjudger on a trust-bond by John Rutherford, the pursuer's grandfather, as a title to exclude, founding upon it the *exceptio rei judicatae*. The summons in that action concluded for reduction of the same service, precept, and infestment, and to have it found that neither Sir John Nisbett, nor his brother Alexander, had any right to the estate, and that it belonged to Mr. Edgar by his adjudication ; which was substantially the same thing as if it had borne that John Rutherford, the granter of the trust-bond, was the true heir, and entitled to be served. The main ground of reduction was an averment of illegitimacy against Sir John and his brother. The decree is a decree *in foro* upon proof and debate, the process having been in dependence from 1791 till 1797. The pursuer meets this plea of *res judicata*, by stating that he does not represent his grandfather John Rutherford, and that the decree is *res inter alios acta*. The statement that he does not represent is denied ; but the defender joins issue with the plea founded on the assumption of it, and maintains, that still the decree is *res judicata* against the pursuer.

“ The question of law is, Whether, where an estate stands destined by fee-simple titles, and a person is served heir of provision, and infest as being the lawful son of the deceased, and the immediate heir of provision, failing such lawful issue, challenges the service on the ground of illegitimacy, and decree of absolver follows, after full proof and debate, a subsequent heir of provision, not representing the pursuer of that action, may at the distance of years maintain an action to the same effect, and is not barred by the exception of *res judicata* ?

RUTHERFURD
v.
NISBETT'S
TRUSTEES.
1882.

“ The Lord Ordinary has not seen any precise decision of the point, and the argument on abstract principles is somewhat difficult and subtle. He is clear that the case of Gordon v. Ogilvie in 1761 is materially different ; because in that case the pursuer was obliged to found on the former action, in order to elide prescription ; and the same was the case in Maule v. Maule. But here prescription is not pleaded, and it would be excluded by minorities.

“ The general rule of the law is clear, that in order to found the exception of *res judicata*, for it is an exception to be pleaded, not a ground of incompetency in the action, it must appear that the former suit was between the same persons, concerning the same thing, and on the same cause of action. But the question here is, whether the pursuer, insisting as apparent heir under a special destination, is not to be considered as the successor of the former apparent heir in this matter, whether he represents him on the passive titles or not, and is thereby bound by the decree pronounced in the suit at his instance, concerning the same thing, and on the same cause of action ? In plain sense it is, whether the trial of John Nisbett's legitimacy, in relation to the right of succession to this estate, at the instance of the immediate heir for the time, is not conclusive against more remote or future heirs ?

“ If this action related to any other estate, the Lord Ordinary can see no room for doubt that the pursuer would be entitled to try the question of legitimacy, and would not be barred by the former judgment. But his title here is as apparent heir in the same estate in which Edgar's constituent was apparent heir, if the illegitimacy could be proved. The title is one and the same in both cases. The Lord Ordinary cannot

RUTHERFURD
v.
NISBETT'S
TRUSTEES.
1832.

assent to a position of the defenders, that the pursuer's grandfather could, as apparent heir, have discharged by voluntary deed all title to the estate, and all right to reduce the service, so as to bind the pursuer, not representing him. He apprehends that this position is erroneous, and that the illustrations given in support of it are wholly inapplicable. The precise ground of challenge must be attended to. On the supposition that John Nisbett was illegitimate, he had no title that could be ratified. His service and infestment were mere nullities ; and there was no deed of any kind executed by the deceased. A deed on deathbed is not null ; it is a good title, unless challenged by the heir-at-law, and therefore the immediate heir may discharge the right to challenge, and ratify the deed. A deed contrary to the obligations of a marriage-contract is partly in the same situation ; but the *jus crediti* is stronger ; and as it is fully vested in the first heir, a discharge by him must be still more effectual.

"Such a case as that of *Gordon v. Ogilvie* may be more doubtful ; but still, even there, there is a deed *ex facie* flowing from the ancestor, the right to challenge which is in the first heir ; and though the effect of a collusive compromise, whereby that title is recognised as valid, might be a subject of great doubt, it is still a very different case from the present. The Lord Ordinary is of opinion, that no private deed by the pursuer's grandfather, acknowledging John Nisbett to be legitimate, and without trial discharging the right to challenge the service, would have barred the pursuer, not representing him, from instituting such a challenge. The parties might indeed have settled the whole matter at that time, if John Nisbett had permitted decree of reduction to pass, and a title to be made up by the pursuer's grandfather, and then obtained a conveyance from him. But it is apprehended that the latter, as a mere heir-apparent, could not convert the service which was null into a good title, or by any discharge close the door against the trial of the question of legitimacy by another heir.

"Neither can the Lord Ordinary assent to another position taken by the defenders, if considered in the abstract. He does not think that it is an invariable test of a man having a good title to pursue, that decree of *absolutor* to be obtained against

him will be *res judicata*—or, *a converso*, that the decree must be *res judicata*, if he has a good title. A man may have a good title for his own interest, though the decree will not bind others. And so here, if it could be shown to be legally true that the pursuer has in the proper sense a separate interest from that which was vested in his grandfather, the question of legitimacy might be still open to him.

RUTHERFURD
v.
NISBETT'S
TRUSTEES.
1882.

“ But although the Lord Ordinary cannot adopt these propositions, on which much of the argument of the defenders is rested, he is on the whole of opinion, that the decree produced does constitute *res judicata* against the pursuer. His view of the matter is extremely simple ; perhaps it may be thought too simple to meet all the ingenious refinements of the pursuer's argument. But it appears to him, that as John Rutherford is admitted to have been the immediate heir of provision in this estate, failing lawful issue of the then deceased Sir John Nisbett—as he was thereby *in titulo* to try the question as to the legitimacy of John Nisbett—as that question was tried and decided on full evidence and discussion—and as the present action relates to the same estate, is directed to the same object, is laid upon the same allegations of fact, and the same medium in law, and is insisted in by a substitute heir, called by the same deed of provision,—the one trial of the question with the proper party at the time must be conclusive, and bind all the heirs of that destination.

“ In the case of entailed succession, where there is a *jus crediti* in each substitute called, if a question is raised by the immediate heir as to the efficacy of the entail, or the validity of deeds done by a former heir, there may be a doubt whether the trial of any such question, without calling all the existing substitutes, will be effectual against them ; though even in that case it is thought that a deliberate judgment on the question must be conclusive. But in the case of fee-simple succession, or where the question does not relate to the validity of any deeds done, but to the title of a party claiming to be the heir, depending on the matters of fact or law in his situation, the Lord Ordinary thinks that the immediate heir having clearly at the time the only title to try the question, a solemn judgment in an action at his instance must determine the point for ever.

RUTHERFURD
v.
NISBETTS'
TRUSTEES.
1882.

"It seems to be of little importance whether this result shall appear to be arrived at upon views of strict law or upon principles of equity. But if it does appear to embrace the substantial law and justice of the case, it is certainly much fortified by a consideration of the danger of the loss of evidence, the dangers of perjury, and the insecure condition of rights of property, which would be involved in the opposite principle."

JUDGMENT.
Nov. 27, 1882.
OPINIONS.

The pursuer having reclaimed, the Court Adhered.

LORD JUSTICE-CLERK BOYLE observed,—“I assume, at present, that the pursuer has taken no benefit by his grandfather. But then it is agreed that he stood in the relation of next heir, if there were none of the body of Sir John, who died in 1776. A service was expedite by the late Sir John, who possessed till 1791, when proceedings were brought at the instance of John Rutherford, on the specific allegation of illegitimacy, and the present summons is identical, on the same *media concludendi*, and with the same conclusions. Then, after a full proof, and hearing, decree of *absolvitor* was pronounced. That suit was by a trustee, but it was prosecuted undoubtedly for behoof of John Rutherford, and it is the same as if it had been in his own name; and now we have a summons by his grandson, claiming the same relationship and right of succession. The defence of *res judicata* is pleaded, and the only answer to it is, that this party does not represent his grandfather. Now, I cannot admit this to make a difference, for he is exactly in the same character, and the plea of *res judicata* does apply. He is not at all in the character of an heir of entail—no one could bring such an action but the heir-apparent, and no distant substitute could. I have great doubts whether he does not come under the very words of the authorities quoted, who talk of ‘the same parties or their ancestors, or authors,’ as being those against whom *res judicata* may be pleaded. But when I further consider that the very same question is stirred, the same *media*, and the same object, I am of opinion that there is everything necessary to constitute *res judicata*; and if not, what is to prevent a dozen brothers each trying the same question over and over again? Now, has the law constituted any such anomaly? Undoubtedly not.

"The circumstance that no case of the kind can be pointed out, is evidence that the rule of law is considered to apply to such. There is, however, one case which I cannot get over so easily as the pursuer. It is that of *Gordon v. Ogilvie*, which appears to me to be expressly in point. The principle decided is set forth in the summary thus,—‘An apparent heiress having made up titles in the person of a trustee by an adjudication upon a trust-bond, in order to challenge her predecessor’s deed ; and decree *absolvitor* having passed against her, this was found a *res judicata* against the next apparent heir, making up titles in the same manner, and challenging the deed.’ I cannot say there is anything in the report to contradict this summary ; and this, with the authorities, satisfies me that as the party is standing in the same right and character, which is important, *res judicata* must apply ; and as inextricable confusion and difficulty would occur, I am for adhering. I will only add, though we are greatly obliged by Lord Moncreiff’s Notes, we are not held to concur in all he lays down."

RUTHERFURD
v.
NIBBETTS'
TRUSTEES.
1882.

LORD GLENLEE observed,—“There is a great deal in the Note of the Lord Ordinary we are not called on to determine ; but I concur in the conclusion stated by him, that although he cannot agree with much of the argument for the defenders, which I am not surprised at, he comes to this, that the question having been decided with the party in the full right which this party has, whenever that right devolves on another, though he do not represent him on the passive titles, the right being the same in every respect, *res judicata* applies. The permitting a challenge under a trust-bond is a deviation from the strict rule, but, when admitted, it is the same exactly as if the party himself had served and brought the action, and the principle of *res judicata* must equally apply. The consequences would be terrible if another rule was followed. Suppose a creditor adjudges on a charge to an apparent heir not in possession, is he liable to have his right set aside by another apparent heir not representing him ? The only thing on which the whole plea rests, is an expression of Mr. Erskine. Talking of decrees in absence, he says, they do not form *res judicata*, because the party ‘cannot be said to have referred his cause to the decision of the Court, in virtue of the contract implied in *litiscontestatio*, which is the true

RUTHERFORD
v.
NISBETTS'
TRUSTEES.
1882.

ground upon which a decisive sentence becomes final.' This, however, is only a strong way of expressing it; Mr. Erskine never meant to rest on the contract of litiscontestation. I adopt the last view of the Lord Ordinary, and am for adhering on that ground."

LORD CRINGLETIE.—"Even take an heir of entail. The case of Ascog would be a strong case, if another heir should insist on trying it over again, and demand repetition. I take the simple view of the Lord Ordinary, noticed by Lord Glenlee, and on that I am for adhering."

LORD MEADOWBANK.—"I am clearly of the same opinion."

1. The equity of the judgment in the case *GORDON v. OGILVIE*, is very apparent, but on the first consideration of the points raised, the plea of the pursuer, that he did not represent his mother, and therefore was not bound or barred by her acts, has the appearance of being well founded. The fundamental ground on which the judgment must be held to rest is, that a defender is not bound to litigate with a pursuer, unless a judgment of absolvitor in his favour shall be held good against all the world, where a second party suing sues in the same character as that of a former pursuer. This result is effected in the ordinary case by the principle of representation. The plea, however, of a second apparent heir, challenging a right which had been previously challenged by a preceding heir-apparent, is, that he does not represent the former apparent heir. The same result, however, is effected by means of a virtual represen-

tation, in the case of an apparent heir challenging a right completed by infestment on the title of an adjudication proceeding on a trust-bond granted by himself. In strict law a party cannot challenge an infestment, unless he is infest himself. A relaxation of this rule of law is granted to an apparent heir seeking to reduce an infestment in the lands which belonged to his predecessor, and this is done on the ground, that on account of the infestment sought to be reduced, he cannot aver in his claim to be served heir in special, that his predecessor died last vest and seized in the lands. To require, therefore, an infestment in this case, as being the only competent title to pursue a reduction, would be to deny the right to reduce altogether. In this case, therefore, a general service has been found a sufficient title on which to sue a reduction.

2. An adjudication against an apparent heir upon a charge to

enter heir to his predecessor, proceeds upon the principle that the apparent heir might enter in special to his ancestor. This form of diligence might, therefore, be thought liable to the objection, that as another party was infeft in the lands, whose infeftment prevented the heir being served in special, so neither could an adjudication on a special charge be held competent. An apparent heir, however, is allowed to challenge a completed right in the lands of his ancestor, on what is termed a tentative title, which is constituted by an adjudication on a trust-bond granted by himself. The law, however, holds that such a title is to have the same operation and effect, and that the same liabilities are to be attached to it, as in the case of an entry completed by infeftment proceeding on a special retour. A second apparent heir cannot, therefore, make up a tentative title in the same character as a former apparent heir, without being liable to the same objections which might have been pleaded against him if the former apparent heir had been served in special, and the present apparent heir had been served to him. A judgment of *absolutor*, therefore, in an action of reduction at the instance of one apparent heir whose title rested on a trust-adjudication, is rightly held to be *res judicata* against a second apparent heir making up a title in the same character, and challenging the right of the defender upon the same grounds.

3. The deeds which an appa-

rent heir may wish to reduce as affecting the lands of his predecessor, are of two kinds. They may be deeds, the reduction of which was competent to the predecessor himself. They may also be deeds which the apparent heir conceives that his predecessor had no power to grant. In the former case, the right to reduce may be held to be a right of action and a right of that character, therefore, which could be carried by a general service. If this be a correct view of the nature of the right, then the right no longer remains *in hæreditate jacente* of the ancestor if the apparent heir expedite a general service to him. A second apparent heir would, therefore, require to expedite a general service to the first apparent heir, in order to vest in him the right to reduce. But if the right to reduce had been previously exercised by the first apparent heir, and if judgment of *absolutor* had been pronounced in favour of the defender, then that judgment, it is thought, would found a plea of *res judicata* in an action at the instance of the second apparent heir.

4. Where again an apparent heir conceives that his predecessor has granted deeds affecting the lands which he had no power to grant, then a general service as heir under the original investiture would seem to afford a sufficient title on which to sue a reduction. If he failed in the reduction, the judgment would still, it is thought, be *res judicata* against a subsequent apparent heir again trying the question in the same character,

and upon the same grounds. Some rights are competent to apparent heirs without any service. The right of reducing on the head of deathbed, is one of these rights. An apparent heir may, however, homologate and ratify a deathbed deed. If, however, he challenges the deed and fails, his failure would be held to be similar in effect as if he had discharged his right of action. As, therefore, a second apparent heir cannot challenge a deed ratified by a former apparent heir, so also would he be barred from doing so where the former apparent heir had challenged and failed.

5. "Where the immediate heir consents to, or ratifies the deed, it not only excludes the consenter himself from bringing it under challenge, but every remoter heir, either because the concurrence of the immediate heir removes all suspicion of the deed having been extorted by importunity; or because the same effect is given *fictione juris* to his consent or ratification, as if the dying person had made over the subject absolutely to the immediate heir, and he, after the ancestor's death, had conveyed it to the stranger who was substituted in the deathbed settlement. By the older practice, the heir had no right before his entry to bring either a reduction *ex capite lecti*, or any action whatever, which was not barely possessory. But it has been long the general opinion, that that privilege is one of those which are competent to heirs in the right of apparenecy, at least in those cases where the

deathbed deed is an effectual bar to the heir's entry."—*Erskine*, 3, 8, 99, 100.

6. In regard to the title necessary for pursuing an action of reduction, LORD STAIR observes,— "There is good reason that the pursuer should not insist upon any title to which he might have right by succession, until he be actually infeft in that right, and for the same reason he cannot insist to reduce and improve upon a disposition, or any other right but an infeftment, if reduction be for reducing infeftments."—*Stair*, 4, 20, 14.

7. In the case of *ROBERTSON v. HOUSTON*, March 13, 1707, the pursuer was a creditor in a personal bond granted by the apparent heir of the deceased Lord Whitelaw his uncle. On this title, he brought a reduction and declarator against the widow of Lord Whitelaw, concluding that he had good right to remove all debts or deeds that might affect the estate of Lord Whitelaw, and that the defender having vitiously intromitted with her late husband's effects, all obligations granted by him to her ought to be declared extinct by confusion, and that she ought, as vitious intromitter, to make payment to the pursuer of the sum contained in his bond, and to pay all the debts, and relieve the heir thereof. The defender objected to the title to pursue until an adjudication should be led upon the bond against the granter as lawfully charged to enter heir to his uncle.

8. The pursuer PLEADED,—The

debtor in the bond might pursue *declaratorie* for removing any debt whereby his uncle's heritage might be affected, and any personal creditor might, by way of declarator, save the needless expense of adjudication, charter, and infestment. The defender PLEADED,—Law and form require that people be not put to unnecessary trouble of exposing their writs to any that have not a right equally good in form, at least. Even an adjudication, therefore, is not a sufficient title to force production of rights on which infestment has followed. No real right can be reduced or declared against, except upon a real right. If an apparent heir could pursue reductions and declarators of real rights, without establishing a title thereto, the service of heirs would be needless. This result also would follow, that an *absolvitor* in favour of the defenders would not prove *res judicata* against remoter heirs, who still might serve heir to Lord Whitelaw, and so shun the effect of *res judicata* against the preceding apparent heir. A title, therefore, must be established, in order that the contradictor be *habile*. Apparent heirs have the privilege of reducing deathbed deeds to their prejudice, because their simple consent, although unentered, excludes all reduction at their instance, or that of their successors. This privilege, however, is not to be extended to other cases. The Lords “Sustained the pursuer's title, he completing the same by an adjudication before he can farther insist; and, in the meantime, stop procedure in the

process.”—*Forbes' Decisions*, p. 145.

9. In the case of MACPHERSON v. MACPHERSON, January 28, 1713, it was held, that a charge against a superior, upon an adjudication led by a trustee for behoof of an apparent heir upon his own bond was sufficient to entitle the adjudger to reduce real rights clothed with infestment. An apparent heir having granted a trust bond, and the creditor in the bond having adjudged and charged the superior to enter him, he brought a reduction and improbation of all rights in the person of the defender affecting the lands. The defender PLEADED,—The pursuer is not infest in the lands, nor is the charge against the superior equivalent to infestment in the present process more than in a removing, although, *fictione juris*, it be effectual in some particular cases, as for bringing in, *pari passu*, adjudgers within year and day of the first effectual adjudication. The pursuer REPLIED,—An adjudication to enter heir as effectually carries right to the lands as if the heir, being served and infest, had disposed the same. *Tantum operatur fictio in casu ficto, quantum veritas in casu vero*. In the same manner, a charge against a superior to infest an adjudger has the same force as if the creditor had been actually infest.

10. The defender farther PLEADED,—The adjudication being for behoof of the apparent heir, no reduction and improbation of real rights can be sustained without an actual service and infestment

thereon. An apparent heir served, but not infeft, cannot force production of rights completed by infeftment, more than an apparent heir not served, can reduce a personal bond. The reason of this is, that apparency does not make the apparent heir a proper contradictor; and the defender, though as-soilzied, might, upon the apparent heir's death, be reconvened by the next heir served. By practice, apparent heirs are only empowered to reduce rights on deathbed, and rights without removing which they could not be served. *Exceptio firmat regulam in non exceptis*. Besides, as the apparent heir has taken an assignation of the adjudication from the pursuer his trustee, he has made himself *passivè* liable. The diligence, by coming in the person of the apparent heir, is, *eo ipso*, extinguished, and cannot be the title of so important an action as the present. The charge against the superior must fall with the adjudication itself. The pursuer REPLIED,—Whatever may be the effect of simple apparency, an apparent heir furnished with an adjudication and a charge against the superior, in the person of a trustee, has a sufficient title in a reduction. And, seeing the apparent heir, by the adjudication on his own bond, subjects himself *passivè* to the defunct's debts, as effectually as if he were served heir, no one is prejudiced whether he possess by such an adjudication or by infeftment on service and retour. The Lords Repelled the objections against taking a term for producing the writs, and sustained

action against the defender.—*Forbes' Decisions*, p. 650.

11. In the case of *KEITH v. LORD BRACO*, January 23, 1739, an adjudication on a charge to enter heir without infeftment was held to be a good title in a reduction. LORD KILKERRAN observes,—“An adjudication proceeding upon a charge to enter heir, though no infeftment had followed on it, found a good title in a reduction and improbation to force production of all writs flowing from the person to whom the party was charged to enter, or from his predecessors, but not to force production of writs flowing from the authors of said person, or of their predecessors, unless the pursuer should first condescend upon such authors, and give reasonable evidence that they were his authors.”—*Kilkerran's Decisions*, p. 578.

12. In the case, *HORNS v. STEVENSON*, Nov. 6, 1746, it was held that a general service was a sufficient title in a reduction of a right on which infeftment had followed. The defender in the reduction produced an adjudication, with infeftment upon it, and objected to the pursuer's title, which was only a general service, as not being a sufficient title to carry on the reduction. The Lords repelled the objection. LORD KILKERRAN, in his *Decisions*, observes,—“A general service has always been sustained as a sufficient title to reduce all rights to whatever subjects belonged to the predecessor, although the predecessor was thereon infeft,

not only because it has been thought unreasonable to put one to the expense of a special service and infeftment, till it should appear whether he was to have any benefit by it, but that the objection to the title would otherwise be a circle, for it is a good objection to a special service, that another deriving right from the predecessor stands infeft in the subject. The heir served in general must therefore be allowed to have a good title to reduce, else the heir cannot have a title at all."

—*Kilkerran's Decisions*, p. 579.

13. In the case of *GRAHAM v. GRAHAM*, Feb. 4, 1779, an apparent heir under a deed of entail, granted a lease of part of the entailed lands to his sister, for 171 years. He possessed the estate in apparency for thirty years, and dying without issue, the succession opened to his uncle the pursuer. The pursuer made up a title by a general service as heir of tailzie to the heir last infeft, and on this title brought a reduction of the lease granted by the apparent heir to his sister, on the ground that it was granted on deathbed. The defender objected to the pursuer's title, and PLEADED,—The property of the lands let to the defender is still *in hæreditate jacente* of the heir last infeft, and cannot be taken up by the pursuer, without a special service to him. The pursuer's general service establishes his propinquity, but does not vest in him the right of property in the lands. He has therefore no other title, but his right of apparency. A

lease of lands clothed with possession is a real right in the lands for the time, and therefore cannot be challenged by the heir, while the lands are *in hæreditate jacente*. An exception is admitted in the case of a reduction on the head of deathbed, brought by an apparent heir of line. The pursuer, however, is not the apparent heir of the granter of the lease, nor can the pursuer make up any titles to him as the predecessor in the lands. It is only by serving heir in special to the heir last infeft, that he can vest himself in the property of the estate. He is therefore in the proper and legal sense of the words, the apparent heir of the heir last infeft, and has no connexion with the apparent heir who granted the lease while the lands remained *in hæreditate jacente*. The conduct of the pursuer is *in fraudem* of the Act 1695. He avoids making up his titles to the heir last infeft, in order that he may not be subjected to the debts and deeds of the interjected apparent heir who granted the lease. He ought not, however, to have the benefit of challenging the deeds of the interjected apparent heir, while by lying out unentered he does not become liable for his debts and deeds, as that statute justly requires.

14. The pursuer REPLIED,—By his general service, the pursuer is ascertained to be the heir entitled to take up the succession to the lands in question. But without that service, the pursuer has a sufficient title as apparent heir to

carry on the present action. The privilege of reduction, *ex capite lecti*, is given to heirs of provision and tailzie, as well as to heirs of line. There is no room, therefore, for any solid distinction between the apparent heirs of the one kind and of the other. Both kinds of heirs are now considered as equally entitled to challenge deathbed deeds, although anciently the law might have been different in this respect. The pursuer is truly and substantially the apparent heir of the granter of the lease in question. By his service he is now made to represent the interjected heir, who has been three years in possession, as much as to any predecessor to whom he serves. Before making up his titles, he is substantially apparent heir to the interjected heir. This is the meaning which the Statute puts upon the term "apparent heir." The Statute says, that when such an heir is served, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir.

15. The Court found, "That the pursuer's general service was no sufficient title to pursue this action: But found that the pursuer's right of apparenacy as heir to Charles Graham, the heir last infest, was a sufficient title to carry on the process on the head of deathbed." At the first advising of the cause, LORD BRAXFIELD observed,—“There are two reasons of reduction libelled, and they merit different considerations. The petition lays the stress upon this question being necessarily con-

nected with the removing, but that is not to the purpose. If the pursuer has not a right by apparenacy, what better right has he by his general service? He serves in general as heir of the institute. This points him out to be the heir; but, if he has a right in his person, a service is not necessary. The use of a service is to transmit a right from the dead to the living. If the defunct had only a right of action, the general service is proper for transmitting that right of action. Here there is a real right, which he can only carry by a special service. The case of Rowan, Dec. 1635, to be sure, says otherwise, but I think that decision erroneous. Independent of the plea of deathbed, the pursuer has no title. Deathbed is introduced in favour of the heir of the person who granted the deathbed deed, it is a privilege vested in the apparent heir; but the pursuer is not the heir of line, nor can he make the challenge as heir to the granter of the tack, for the granter never made up the titles." LORD JUSTICE-CLERK MILLER observed,—“The general service carries nothing; but I cannot get over this ground, that the pursuer is heir of tailzie. A burden is created by the apparent heir not infest. If the apparent heir burdens, may not the next apparent heir challenge?" LORD COVINGTON observed,—“If Harry Graham, who granted the lease, had made up titles, the apparent heir might have challenged. Is it not strange that his deeds should be less subject to challenge when

his titles are not made up, than when they are?" LORD BRAXFIELD farther observed,—“How can the pursuer reduce the deed of a person to whom he cannot serve? Let him take up the estate, and bring his action.” LORD MONBODDO observed,—“This is but a tentative process. If the pursuer fails in his reasons of reduction, he will not meddle with the estate. Why should we force him to take up an estate from which, perhaps, he will draw no benefit?” Lords Kames, Alva, Gardenston, and Braxfield, dissented from the interlocutor.—*Hailes' Decisions*, vol. ii. p. 823.

16. At the second advising, LORD HAILES observed,—“If I mistake not the argument of the defender, the result is this,—that an heir of entail, who has been three years in possession without making up titles, may, on death, burden the estate at pleasure, for the heir of line has a right to challenge, but has no interest, and the heir of entail has an interest to challenge, but has no right. Now, it is certain that, to authorize a challenge, there must be both right and interest.” LORD BRAXFIELD,—“A man that never makes up titles is not at liberty to dilapidate. The heir of entail may make up titles to the person last infeft, and then may challenge the deeds. The pursuer at present is a mere stranger.” LORD KAMES,—“The interlocutor is against all principle. The apparent heir, three years in possession, is not proprietor, but his actings, after three years' possession, are effectual.”

LORD COVINGTON,—“It seems very odd, that I should be obliged to make up titles in order to challenge, when this very title which I make up shuts my mouth from challenging.” JUSTICE - CLERK MILLER,—“The pursuer is not apparent heir to the person last in possession, nor could he, for that person was never infeft, but still he is next in succession, and he is apparent heir in the sense of the Act of Parliament quoted. The reason of his not making up titles is, because he does not know whether the estate is worth the taking.” PRESIDENT DUNDAS,—“Formerly, an apparent heir could not reduce unless he made up titles, but this rigour has been mitigated by later practice. The pursuer is not properly an apparent heir, *jure sanguinis*, but he is an apparent heir of investiture. I consider who the person is that has an interest to pursue. He might, by the circuit of a trust-bond, have pursued this reduction, and why may he not in the present shape?” LORD BRAXFIELD,—“By charging a man to enter heir, in consequence of a trust-bond, I carry all right that was in the predecessor.”—*Hailes' Decisions*, vol. ii. p. 824.

17. In the case of *MACCALLUM v. CAMPBELL*, Feb. 21, 1793, it was found that a general service as heir of line was not a sufficient title to pursue a reduction of a right to lands on which infeftment had followed, where the pursuer, if successful, must take them up as heir of provision. In 1725, Neil MacIndoir obtained a new

charter from the superior in favour of himself and the heirs-male of his body; whom failing, Duncan MacIndoir and the heirs-male of his body; whom failing, the nearest and lawful heirs-male of himself; whom failing, his own heirs and assignees whatsoever. Infestment followed on the charter in favour of Niel the institute, who died leaving an only daughter. The succession therefore opened to Duncan MacIndoir, who was survived by an only son. On the death of the son, John MacIndoir took up the succession under the charter as nearest lawful heir-male of Niel; and in 1753, the superior granted him a precept of *clare constat* in that character, upon which infestment followed. John MacIndoir disposed the lands to Mr. Campbell. In 1792, Niel MacCallum, the son of Mary, only daughter of Niel MacIndoir, served heir in general to his grandfather, and brought an action of reduction against Mr. Campbell and the representatives of John MacIndoir, on the ground that not only John MacIndoir was not the heir-male of Niel, but that there was no heir-male in existence, so that the succession opened to him under the last destination of the charter 1725 to heirs whatsoever.

18. The defender PLEADED,—The pursuer's general service as *legitimus et propinquior hæres* of Niel, does not give him a sufficient title to carry on the present action. Although the fact established by the service may be true, it does not follow that the preceding destinations in the charter 1725 have

failed, and that the pursuer has now right to the lands in question; nor has he in any way connected himself with the lands. The defender further pleaded, that the rights produced were sufficient to exclude the pursuer's title, upon his instructing the fact that his predecessor's author was Niel's nearest lawful heir-male, of which he offered a proof. The pursuer PLEADED,—Unless his present title is sustained, the pursuer must be excluded from insisting in the present action. It is impossible for him to obtain a special service as heir of provision to his grandfather, because while the precept of *clare* and infestment in favour of John MacIndoir stand in the way, it can never be said that his grandfather died last vest and seised in the lands. Neither can the pursuer expedite a general service as heir of provision to his grandfather, because before obtaining it, he must prove that all the heirs-male called to the succession have failed. But this he cannot do till the precept of *clare* in favour of John MacIndoir, asserting the existence of an heir-male, be reduced. Besides, it has been decided that a general service is a sufficient title in the reduction of rights, and on which infestment has followed. Even if the pursuer had not been served either in general or special, yet in the circumstances of the present case, where it is impossible he can establish any right to the lands till the defender's titles are set aside, his right of blood alone ought to be held sufficient to

enable him to insist in the present action.

19. The Lord Ordinary Found that the titles produced were not sufficient to exclude. Upon advising a reclaiming petition for the pursuer, the Lords Recalled the interlocutor reclaimed against, and Found the pursuer had not yet produced a sufficient title, but allowed him to do so *cum processu*, and sisted process for that effect. In the Faculty Report it is stated,—"The Court were of opinion that the pursuer's present title was insufficient, but at the same time it was observed, that the effect might be remedied notwithstanding the existence of the precept of *clare constat*, in any of the following ways: first, by a special service as heir of provision to his grandfather; secondly, perhaps even by a general service in that character; or thirdly, by an adjudication on his own trust-bond, followed by a charge to the superior to enter him. It was also observed that an infeftment flowing *a non domino* does not exclude a second."

20. On the Session Papers in this case, LORD PRESIDENT CAMPBELL has written,—“A service as heir in general to his grandfather does not connect with the lands. He should either have expedie a special service as heir of provision to Niel, the person last infeft, or perhaps to Duncan, for it is not clear whether the fee was in Niel or Duncan, or he should have made up a title by adjudication upon a trust-bond. What is produced as an exclusive title, is truly

not so; at least it requires a proof to make it so. The only instance, it is believed, where an exclusive title requiring proof is sustained, is in the case of the positive prescription, the Court allowing a proof of the possession to be reported within such a day, and assigning the same day as the first term for making a full production. At least this is the proper term. The proper defence, however, in the present case, is, that the pursuer has no title at present which can enable him to pursue. But if the defender wishes to go immediately to proof, why should he struggle this point, and why hesitate to make a full production?

21. “An adjudication not completed by charter and infeftment has always been sustained as a sufficient title, but the connexion with the lands in that case is evident, and it would be against the interest of both parties to require that it should be completed by infeftment. In the case of reduction on the head of fraud, it is enough to serve heir in general to the person whose deed is to be reduced, in order to carry the right of action which was in that person himself, and the same may be said of any other grounds of challenge affecting the predecessor personally. But to challenge real rights or incumbrances of any kind affecting lands, and which make it necessary for the pursuer to connect himself with the lands, he must do so in a proper manner, either by adjudication on a trust-bond, or by a special service to the person last infeft, or by taking up some unex-

ecuted procuratory in the form of a general service, which last, though not completed by charter and infestment, will be sustained a sufficient and undoubted title for the purpose of reducing an infestment flowing from the predecessor, or real rights of any kind affecting the lands. This, though a deviation from strict principle, is founded upon equity and expediency, being equally beneficial to both parties, and probably nothing more is meant by Lord Kilkerran in the case of Horns, p. 579. See also Kames' *Educedations*, p. 133; and Graham, Feb. 7, 1779. In the present case, the pursuer has by his service only proved his propinquity to his grandfather, or in other words, that he has the character in him under which he might, as a substitute heir of provision, be served heir to his grandfather in the lands; or make up titles by an adjudication on a trust-bond; for even in this last case, the party may be put to instruct his propinquity if it is disputed, in the same way as the superior may, before granting a precept of *clare constat*, insist that some proper evidence should be laid before him of propinquity, by a general service or otherwise."—*MS. Notes, Sir Ilay Campbell's Session Papers*.

22. In the case of CARMICHAEL v. CARMICHAEL, Nov. 15, 1810, it was held that a general service by an apparent heir cannot be used as a title on which to challenge another's infestment, without the pursuer rendering himself liable to all the objections that would be competent against him if entered.

In this case, LORD GLENLEE observed,—“ There appears to be much in what is said by the respondent, that a general service is sufficient only where it transmits a personal right. And there is some reason to suspect that the case reported by Lord Kilkerran was one where the infestment flowed from the person to whom the general service was made. But the other supposition is perfectly intelligible; and there is much equity in the reason given, that it would be hard to force a person to enter heir before it was known whether anything could be obtained in that character. But, on the other hand, a person to whom this indulgence is given, must be liable to all the objections competent against him, if his titles were made up. On this ground, Miss Carmichael must be supposed to have completed her titles, and liable to all the objections that, in such a case, might be urged against her.” LORD MEADOWBANK observed,—“ He agreed in opinion with Lord Glenlee; there must have been a remedy at common law, for the case of an heir wishing to clear away an infestment that stood in his way. The ordinary way of proceeding in such a case is by adjudication on a trust-bond, but that is only a statutory remedy. The mode pointed out by Lord Kilkerran is the one at common law. But a general service is only an inchoated title, and does not give possession, *nulla sasina, nulla terra*. But it is sufficient to clear the way, and to try the validity of another's infestment.”

23. LORD NEWTON observed,—“The only doubt that had occurred to him on the question was, whether the lady, being a minor, could be compelled to enter. But that doubt was removed, as it had been made out that, in strictness, she had no title to pursue the present action without making up a title. The case of M'Clure was in point, and rightly decided. On that authority, she cannot pursue the action without completing a title, unless she puts herself in the same situation as if the title were already made up. Till she is served and infest, she has no title to challenge the present investiture, and as soon as she is served and infest, she is barred from challenge.”

24. In the case of CUNNINGHAMS v. GLEN, February 27, 1812, the pursuers claimed to be served heirs-portioners of line and provision in special to their uncle. The lands in question had been taken by their uncle in favour of himself and his wife, in conjunct fee and liferent, and to Thomas their eldest son, his heirs and assignees in fee, and infestment was taken in favour of these parties in their respective rights of liferent and fee. The wife predeceased her husband; and on the death of his father, the son, without serving to his father, entered into possession of the subjects. He conveyed the subjects to himself and the heirs of his marriage; whom failing, to his wife and her heirs whatsoever. On his death, he was succeeded by an only child, who did not long survive him. The right to the subjects then opened to his widow, who entered to pos-

session of them, and was duly infest; and having married the defender, she disposed the subjects to him in absolute right, and he was regularly infest in them. The pursuers' claim of service was opposed by the defender, who alleged an absolute right in himself. The Sheriff-depute sustained the objections, and dismissed the claim. The claim was then advocated to the Court, when it was dismissed as incompetent. At the advising, LORD PRESIDENT HOPE observed,—“There is a preliminary question not touched in the papers, whether a special service can at all be applicable to such a case as this, where the fee is already full by the infestments of Margaret Henderson and George Glen, the respondent. It is here impossible to have the answer of the brieve as to George Cunningham being the last infest. He is not so. In such a case, the course is to have a general service, and on that title, which is now held sufficient, to reduce those infestments. Or else on the title of an adjudication on trust-bond. That matter was fully discussed in the Second Division, in Forbes of Polmoody's case. A general service was then sustained as a good title to reduce.”—*MS. Notes, Baron Hume's Session Papers.*

25. In the case of COCHRANE v. RAMSAY, March 11, 1828, the Court, by a majority of one, held that although there had been a prior general service to an ancestor, a second general service to the same person was competent, without the necessity of serving

through the party who had obtained the prior service. On appeal, however, this judgment was Reversed, April 29, 1830. In that case, LORD CRAIGIE, who was in the minority of the Court, observed,—“Before the enactment in 1795, an heir could not directly claim an estate which had belonged to his ancestor, or in any respect intermeddle with the ancestor's estate without subjecting himself to the payment of all the ancestor's debts. It was also held incompetent, in virtue of a general service, to challenge upon extrinsic grounds an infeftment in property in favour of a third party, unless where, by virtue of that infeftment, the ancestor had been denuded so as to prevent a special service in favour of the next heir. Indeed, unless in cases of absolute necessity, it would have been quite unjust that a right of a party infeft should be liable to challenge at the instance of one who had no immediate right in the subject, and whose proceedings, however conclusive against him, could not, after his death, prevent a repetition of the challenge at the instance of the next and every subsequent heir.

26. “But by the enactment already mentioned, the situation of parties was placed upon a more just and consistent footing. The heir is thereby enabled in every case, without incurring a passive title, unless he also enter into possession, to vest in himself, by a trust adjudication, an active title as to every heritable right or claim which might belong to any one or

more of his ancestors, according to the terms of the charge to enter heir which are employed. He may do so, even with reference to an entailed estate; and although his right of succession is under challenge, as in the noted case of Roxburghe, also where it is doubtful whether the ancestor is dead or alive.

27. “But while all these advantages are secured to the heir, or to the party asserting himself to be heir, and making up titles in the manner specified in the Statute, the adverse party is, as in justice he ought to be, protected from all the inconveniences and hardships arising from any former practice in these respects. Before the right is finally recognised, therefore, if the fact is denied, the trust adjudger must prove that his constituent is the true heir. He must do so under the eye of the defender, who is authorized to bring a contrary proof; and this proof may be brought even after the truster's death, in the same manner as if the adjudication had been led for an ordinary debt. And if, in the litigation which follows, the defender is successful on the merits of the action, no after challenge can be brought against him. From this it follows, in my humble opinion, that in no case, and least of all in the circumstances here occurring, can a party now be permitted, under the colour of a general service, to challenge a standing investiture. In such circumstances, both justice and equity concur to control and undo the effect of any examples which could be pointed out as authorizing a different course.”

28. In the first branch of the case of *RUTHERFURD v. NISBETT'S TRUSTEES*, November 12, 1830, it was found that an heir-apparent, whose propinquity and apparency were admitted, was entitled in virtue of his apparency alone, without any service, to pursue a reduction of the service and infestment of a party whom he averred to have been illegally served, in respect of his being illegitimate. The defenders admitted the propinquity of the pursuer, and that he would have been entitled to succeed as heir of provision, had the first Sir John Nisbett died without lawful issue male; but they PLEADED, as a preliminary defence, that the pursuer was not entitled to insist in the action without a service. The pursuer PLEADED,—The sole question is, whether a service be necessary to vest the pursuer with the right to challenge the last Sir John's service to his father, and his infestment thereon? The true purport of the action is, to remove Sir John's service out of the way, so as to leave room for a service by the pursuer. The pursuer's right to insist in an action for this purpose is personal to himself. It arises immediately from his character of apparent heir, and his consequent right to be served, in the event of his being able to establish that the last Sir John was illegitimate. It does not depend on a right to be transmitted from any of the former proprietors of the estate, but arises simply from his character of apparency. This character being admitted, there can be no necessity for a service. To

insist on a service in such cases, would totally exclude all title to pursue reduction of a previous erroneous service, because a service cannot be obtained till that which excludes it, and is to be the subject of reduction, is set aside.

29. LORD MONCREIFF, Ordinary, pronounced the following interlocutor:—"In respect it is not denied that the pursuer possesses the title of propinquity set forth in the summons; and it is expressly admitted in the defences, that but for the evacuation of the destination libelled on by the trust-deeds called for, the pursuer would have been entitled to succeed to the estate as heir of provision under that destination; and in respect of the special nature of this action of reduction, Repels the objection to the pursuer's title, founded on the want of service as heir of provision; and farther, Finds that the title is sufficiently set forth in the summons, in as far as it is therein stated, that the pursuer, by virtue of the propinquity deduced, is the heir entitled to succeed to the estate of Dean under the procuratory of resignation narrated, in consequence of the death of the late Sir John Nisbett, son of the granter, Sir Alexander, without lawful issue, and the failure of the other substitutes,—that the decret of adjudication said to have been obtained by Mr. John Edgar, proceeding on the trust-bond granted by John Rutherford, the pursuer's grandfather, forms no bar to the present action,—Therefore repels the first dilatory defence."

30. The Court adhered to the

interlocutor of the Lord Ordinary. LORD GLENLEE observed,—“The first thing in considering a title to pursue, is to look at what the action is. Here it is simply to reduce the titles made up by the last Sir John, in order that the pursuer himself may serve. It is often impossible to serve, in order to set aside deeds, as, for instance, in the case of contravention by an heir of entail. But to enable the pursuer to serve, he must set aside the service of the last man; and the conclusion is, to set it aside that he may serve. Now, the title to pursue such an action as this, is just the character of apparenancy here admitted, which would entitle the pursuer to serve, if the title he challenges were out of the way, and though he no doubt must serve to get a right to the estate, he must first be allowed to set aside this before he can serve. As to the other matter, it was said that the grandfather was charged to enter; but does that make an actual bar to serving? I can see nothing in the objection.” LORD CRINGLETIE observed,—“I am completely satisfied that the interlocutor is right. The conclusion is to set aside deeds, in order that the pursuer may serve; and the defence is, ‘you do not produce a service.’ Now, the very gist of the action is, that he is prevented from serving by the service of the late Sir John, and he must therefore set it aside, in order to serve. As to the adjudication being a bar, it does not affect the estate, and can be no bar whatever.”

31. In the case of MAULE v.

MAULE, July 5, 1831, it was held, that a decree obtained against an heir of entail in possession is good against all substitute heirs of entail, though not parties to the process. The Court were unanimous upon this point, although they differed as to whether the decree in question was *res judicata* or not. LORD COREHOUSE, in his opinion, observed,—“The first point which properly falls under consideration is, Whether the interlocutor ought to be held as pronounced in absence, because the pursuer, though cited in one or more of the conjoined actions, was in pupillarity, and no tutor *ad litem* was appointed to him? We are of opinion, that this reason of reduction is ill founded. There was no need of such appointment, as the pursuer’s father was his administrator-in-law, and acted for him expressly in that capacity. If there had been an opposition of interest between his father and himself, the case might have been different; but there was no such opposition while the action depended in the Court of Session. Nay, if the pursuer had not been cited at all, we conceive that the decree obtained against his father, as the heir of entail entitled to possession, would have been effectual against him; for wherever the interests of the heir and the substitutes coincide, he represents them in every law-suit respecting the subjects of the entail; and a decree pronounced against him, *causa cognita*, and without collusion, is effectual against them. If this were not the law, whenever the rights of third parties are implica-

ted with those of heirs and 'substitutes of entail, the matter might become inextricable, and every judicial proceeding regarding them be rendered insecure."

32. LORD FULLERTON observed,—“ In these circumstances, it is impossible to hold the decree 1782 as a decree directly and *nominatim* against the pursuer. Its operation as a *res judicata* must rest upon a different ground, namely, that though not a decree directly against him, it was a decree effectual against him and the other heirs of entail, inasmuch as it was a decree respecting the validity of entail rights, pronounced in actions maintained by the party fully vested at the time with those rights. That a decree so pronounced will, in the general case, be held an unchallengeable *res judicata*, there seems no reason to doubt; but I think that this special case does not admit of the application of that principle. It is true, that a judgment obtained respecting entailed rights against the party vested with them at the time, is good against the other heirs of entail. But this, of course, involves the assumption that the question has been *bona fide* litigated by the heir in possession, according to a sound discretion, and upon a fair exercise of those privileges to which, by the rules of litigation, he is entitled. There seems, therefore, no reason to doubt that if the litigant, in the exercise of that sound discretion, declines to bring the judgment of a Lord Ordinary under review, that judgment is not impaired; still less is the judgment of the

Court invalidated by the circumstance of his declining to appeal. But it is a very different case when the heir of entail in possession, litigating in his representative as well as individual character, does, during the dependence of his right to reclaim, or of his right to appeal, make those rights the subject of a transaction with the opposite party, and surrender them for a consideration personal to himself. The true grounds of challenge here are, that the judgment 1782, though obtained against a party who happened to be vested with the entailed rights at the time, was obtained, or allowed to become final, under circumstances which exposed it to challenge, in so far as it might be construed to affect the other heirs of entail,—grounds which appear to me to form the apt and competent subject of an action of reduction like the present."

33. The defender having appealed, the House of Lords Reversed the judgment of the Court, and found that the defence of *res judicata* ought to have been sustained. LORD CHANCELLOR BROUGHAM observed,—“ The points attempted to be made of decree in absence and reduction, *ex capite minoritatis*, need not be considered at all. They are wholly untenable, and indeed respecting these I perceive no difference of opinion amongst the learned Judges. All agree in rejecting them.”—*House of Lords' Cases*, August 27, 1833.

34. The law in regard to the question, when a service is necessary to entitle an heir to insist in an action of reduction, is thus

stated by LORD BRAXFIELD, in a paper written by him when at the Bar, in one of the actions relating to the Douglas cause. He observes,—“By the law of Scotland, a service is not necessary where the purpose of it is only to point out the person that is heir in any subject or estate. The purpose of a service is to transmit an estate from the dead to the living, to vest the heir in the subjects that were formerly in the person of his predecessor, but where nothing is to be transmitted from the defunct to the person claiming to be heir, a service becomes altogether unnecessary. In considering, therefore, the question, whether a service is necessary to entitle an heir to carry on any action, this distinction is to be attended to, whether the action was a right in the person of the defunct, or if it was competent to the heir in his own right? In the first case, as the action fell to be considered as an estate in the person of the defunct, a service became necessary to transmit that right of action from the defunct to the heir, although a general service would be sufficient, but where the action arose to the heir in his own right, there a service is not necessary.

35. “Thus, for example, where the defunct had granted a disposition of his estate, but which had been extorted from him by force and fear, as the right of challenge of that deed belonged to the person himself, so a service would be necessary to transmit that right to the heir. But where a deed is granted by any man upon death-

bed, as the challenge competent to the heir upon that head could never be said to be a right in the defunct, but a privilege competent to the heir in his own right, so it is an established point, that a service is not necessary to entitle an heir to carry on a reduction *ex capite lecti*, but it can be carried on upon the title of his apparency only. The grounds upon which the present challenge of the deed, July 11, 1761, proceeds, are two, *Primo*, That the same was granted on deathbed, in prejudice of those who respectively claim to be heir in the estate; and, *Secundo*, That the same was good for nothing as proceeding *a non habente potestatem*.

36. “Now, with respect to the first of these grounds of challenge, it is not necessary for the heir to serve in order to reduce his predecessor's deed *ex capite lecti*. A service is as little necessary to entitle the heir to reduce a deed of his predecessors, upon the second ground, that he had not power to grant it. That surely can never be said to be a ground of challenge competent to the defunct himself, and which behoved to be transmitted to the heir by a service. On the contrary, it appears an absurd proposition, that an heir must serve in order to entitle him to quarrel the deed of the man to whom he serves, upon this ground, that although it was the true deed of the defunct, he had no powers to grant it. The service would rather appear to have this effect, to bar the heir from quarrelling the deed of the person whom by the service he represents.”

SECTION XI.

TRUST DISPOSITION.

Where Lands are conveyed by a Trust-Disposition valid by the Law of Scotland, subject to uses either already declared, or afterwards to be declared, the Trust uses may be declared by any writing valid by the Law of the place where it is executed.

I.—WILLOCH *v.* AUCHTERLONY.

IN 1762, George Auchterlony executed a trust-disposition in March 30, 1772. the Scots form, whereby he conveyed, *inter alia*, to trustees, an NARRATIVE. heritable debt of £4517, 15s., being part of a principal sum secured over the estate of Stanhope, to the end that his trustees “might apply the proceeds thereof towards payment of his debts and legacies, obligations, and donations, in such way and manner as he had already, or should thereafter think proper to give and bequeath by his last will and testament, codicil or codicils thereto duly execute.” He thereafter, in the same year, executed his last will and testament, whereby he appointed his trustees his executors. The will concluded with a clause, by which he “gave, devised, and bequeathed all the residue of his estate to and among his nephews and nieces, grand-nephews and grand-nieces, equally betwixt them.” The testator died two years after, in 1764, when his settlement was challenged by his heir-at-law.

PLEADED FOR THE HEIR-AT-LAW.—An heritable estate can- ARGUMENT FOR
not be devised by testament. By the trust-deed, the disponees HEIR-AT-LAW.

WILLOOH
v.
AUCHTERLONY.
1772.

are no more than trustees, to make way for a future nomination of heirs. No benefit or advantage was intended to the trust-disponees. They were constituted trustees, not for their own behoof, but for the uses and purposes to be thereafter ascertained by the last will and testament, or by any codicil to be executed by the truster. The subject itself, therefore, remained with the truster as part of his heritable estate, and subject to his unlimited powers. The trust-deed cannot, therefore, have the effect of depriving the heir of his right of succession to that part of the heritable estate. The trustees had no *jus quæsitum* by the deed 1762. It remained undelivered, and under the truster's power, as effectually as if the same had never been executed. If a device of this kind were to be allowed to frustrate the heir's right of succession, the law of deathbed would be at an end. The disposition itself, independent of the last will and testament, was no better than a sheet of blank paper. A trust was thereby nominally created, but the uses and purposes of the trust were reserved for the last will and testament. This was, in other words, reserving a power to dispose of that part of the heritable estate by testament—a power which the law did not allow, and which no reservation in a deed of this nature could effectuate. It is the testament, therefore, and not the disposition, which gives force to the settlement, if it can be effectual to any purpose whatever.

The present case differs widely from that of a disposition, in its form, absolute and delivered, but with a reserved power to alter and burden. A deed of this nature is an effectual conveyance of itself, sufficient to denude the granter and his heirs, if the reserved powers are not exercised; but an undelivered disposition like the present is of a very different nature. The granter is not thereby denuded. The estate was his before—it remains his thereafter; and it is only the exercise of the reserved power by testament that can give it any force or effect.

ARGUMENT FOR
TRUSTEES.

PLEADED FOR THE TRUSTEES.—The truster might by a deed in proper form convey his heritable estate to any person he pleased, and under such conditions and reserved powers as he might think proper, and the subject being so conveyed he might exercise those reserved powers by a deed of any kind whatever.

The disposition is in all respects a deed *inter vivos* sufficient to exclude the heir-at-law, and the subsequent testament was only an exercise of the power and faculty thereby reserved to the granter, which the heir cannot challenge, because he was excluded by the disposition, and which the disponers cannot quarrel, because it was done in virtue of a quality in their own right. By the disposition, the subject in question was as fully conveyed to the trustees, as in the nature of things it was possible to be done. What remained for executing the granter's intention, namely, the declaring the uses and purposes to which the trustees should apply the proceeds, might be effectually done by a deed in any form and at any time.

WILLOCH
v.
AUCHTERLONY.
1772.

The Court "Sustained the defence proponed by Robert Willoch and the other trustees of George Auchterlony, against payment of £4517, 15s., and annualrents thereof, claimed in the libel at John Auchterlony's instance against the said trustees : Found that the said sum was carried by and vested in the trustees by the trust-disposition executed by George Auchterlony in their favour, and the said George Auchterlony's latter will and testament, relative to the said trust-right, and assoilzied the said Robert Willoch and the other trustees from the process brought at John Auchterlony's instance against them for payment of this sum, and decerned."

JUDGMENT.
Dec. 14, 1769.

"The Court were a good deal divided. Some were of opinion that the settlement executed was an indirect way of evading the law of deathbed. The majority, however, thought that the trust-deed was an effectual conveyance of the heritable subjects mentioned therein, and that the after declaration was legally executed in virtue of the reserved power in the trust-deed."

OPINIONS.
Faculty Report.

The pursuer having Appealed, LORD BATHURST, Chancellor, presiding,—“It was Ordered and Adjudged that the interlocutors, so far as they are complained of by the cross appeal, be, and the same are hereby affirmed.”

House of Lords'
Journals.
March 30, 1772.

II.—KER v. KER'S TRUSTEES.

Feb. 24, 1829.

NARRATIVE.
SEE INFRA,
p. 439.

In 1819, Lady Essex Ker executed at London a *mortis causa* disposition, valid according to the law of Scotland. By this deed she conveyed to trustees all her lands and heritages in trust, with instructions to sell and dispose of them, and to pay over the residue of the proceeds "to and for the use of any person or persons I shall name by any writing under my hand, or for such purposes as I may direct by such writing; and in default of my making such writing, or giving directions in writing, then to pay over any residue to my next of kin, according to the law of England, or Statute of Distributions."

Some months after the date of this deed, Lady Essex Ker, when on deathbed, executed at London a testament directing, in reference to the trust-deed, that the whole of her estates, heritable and moveable, should be sold, certain legacies paid, and the residue divided among certain persons. This deed was valid according to the law of England, and was sustained as a valid deed in the Prerogative Court of Canterbury.

In virtue of the trust-deed and the relative testament, the estates in Scotland were claimed by the trustees. The pursuers brought an action of reduction of the testament, on the ground that being defective in the solemnities required by the law of Scotland, it was invalid and ineffectual as a direction to the trustees to make over the heritable estate in Scotland to the prejudice of the heirs-at-law of the truster.

ARGUMENT FOR
HEIR-AT-LAW.

PLEADED FOR THE HEIR-AT-LAW.—Although the trust-deed is an effectual conveyance to the trustees, yet the question remains to be considered, For whom do they hold in trust? If there be no effectual conveyance for behoof of a third party, then the trust will be held by them for behoof of the heir-at-law. It is sometimes loosely said that a trust-disposition divests the granter of his heritable right, and that he retains merely a personal right to call the trustees to denude. It may be true, that where there is an unqualified conveyance, subject to a latent trust, the truster has merely a personal right; but al-

though it be personal, it is not moveable, and accordingly could not be carried by a testament. But a deed bearing *ex facie* to be a trust for payment of debts or other purposes, even although delivered in lifetime, does not divest the granter. It is a mere burden, and, on his death, the estate remains *in hæreditate jacente*, and may be taken up by his heirs subject to this burden.

KER
v.
KER'S
TRUSTEES.
1829.

To extinguish the heir's right, it is requisite that there should be some deed of nomination, in favour of another party, executed by the granter; and if there be so, it follows that it is that deed, and not the trust-deed, which divests the heir. The question, therefore, comes to be, Whether a deed which has such an effect requires to be executed according to the forms of the law of Scotland or not? In reference to this, a distinction must be kept in view between the necessity of having disposing words, and that of observing the formalities of the Statute 1681.

Where a trust-conveyance has been made with proper disposing words, and where it declares that the residue shall be disposed of agreeably to a deed of instructions to be executed, it is not requisite that this latter deed should contain disposing words; but it must be executed in terms of the Statute, seeing that it has direct reference to an heritable estate, and has the effect of divesting the heir of the right which he would have to the estate, if there were no such deed in existence. But here the deed is not even subscribed, and it does not appear that in any of the previous decisions there was that peculiarity. They merely prove that a deed in a testamentary form, or without disposing words, is sufficient to give instructions where there has been a previous formal disposition; a proposition which the pursuers do not require to discuss.

PLEADED FOR THE TRUSTEES.—By the trust-deed, the estates are disposed to the trustees for the purpose of being sold, and the residue made over in such way as they should be instructed by any writing of Lady Essex Ker; failing which, to the next of kin, according to the law of England. This deed, which is not challenged, is executed agreeably to the law of Scotland, and therefore is sufficient for divesting the heir, and transferring the property to the trustees. The deed in question

ARGUMENT FOR
TRUSTEES.

KER
c.
KER'S
TRUSTEES.
1829.

is not founded on as a disposition of heritable property, but merely as an instruction by Lady Essex Ker as to the disposal of the proceeds of the estates after they have been sold. The question, therefore, comes to be, Whether it can be recognised as the writ of Lady Essex Ker? This must be decided by the *lex loci*. But it has been found by a competent Court that it is so, and that it is even sufficient as a conveyance of property in England. Being, therefore, probative by the law of the place where it was made, it must be equally so by the law of Scotland. Numerous decisions, accordingly, have been pronounced supporting this plea.

Interlocutor of
Lord Ordinary.

LORD ELDIN, Ordinary, Found, "That in respect the paper writing or instrument produced, however effectual it may be as a will to convey personal or other property by the law of England, is neither signed by the party, nor tested in terms of the Statute 1681, it is altogether ineffectual as a deed to affect a real or heritable estate in Scotland, and therefore decerns in terms of the reductive conclusion of the libel."

JUDGMENT.
Feb. 24, 1829.

On advising a Reclaiming Petition for the defender, the Court Recalled the Interlocutor of the Lord Ordinary, and assoilzied the defenders.

III.—CAMERON v. DICK'S TRUSTEES.

Aug. 29, 1833.

NARRATIVE.

In 1823, James Dick, a native of Scotland, but domiciled in England, executed a trust-deed of settlement of his heritage in Scotland. The deed was executed in the Scots form; and the dispositive clause was in these terms:—"I do hereby give, grant, assign, and dispoise, from and after my death, to and in favour of John West, John Mackie, J. A. Simpson, and John Leitch, executors named and appointed by me, conform to will in the English form, executed by me, and the survivors or survivor of them, all and sundry lands and heritages, with all debts heritable and personal, and whole sums of money and effects, situated in Scotland, which shall pertain and belong, or be ad-

debted, resting, and owing to me any manner of way at the time of my death."

The purposes of the trust were thus referred to,—“But always to and for the uses, ends, and purposes, and under the declarations specified and contained in my will in the English form already executed by me, or to be specified and contained in any other will, codicil, or other writing which may yet be executed or signed by me, and to all which express reference is here made.” The deed also contained this clause of reservation,—“Reserving always not only my own liferent of the subjects heritable and personal, before disposed and assigned, but also full power and liberty to me to alter and revoke these presents in whole or in part, as I shall think fit at any time of my life, or even on deathbed, dispensing with the not delivery thereof, and declaring these presents to be a good, valid, and effectual deed, though found lying by me at the time of my death.”

In 1827, he executed in London a will in these terms :—“I, James Dick, hereby revoking all wills by me at any time heretofore made, do hereby make and declare this to be my last will and testament. I give, devise, and bequeath, all and every my lands, tenements, and hereditaments, and all other my real and personal estate and effects whatsoever and where-soever, not hereinafter otherwise disposed of, unto John Dick, John Mackie, and J. A. Simpson, whom I hereby nominate my executors, administrators, and assigns upon trust.” The purposes of the trust were then declared. This will was in the English form, and was not a probative writ by the law of Scotland, but it was a formal and valid instrument by the law of England. In the same year he executed in London a codicil to this will, and expressly notified the will, but neither the will nor the codicil referred to the trust-deed of 1823.

The heir-at-law brought a reduction of the trust-deed, in so far as related to the heritage conveyed by it.

PLEADED FOR THE HEIR-AT-LAW.—The last will and testament, 1827, of the testator, is ineffectual, and void as a conveyance of heritable property in Scotland, being destitute of the solemnities and requisites which are necessary for the conveyance of such property. It was incompetent for the truster, by

CAMERON
v.
DICK'S
TRUSTEES.
1833.

ARGUMENT FOR
HEIR-AT-LAW.

CAMERON
v.
DICK'S
TRUSTEES.
—
1888.

a deed executed in the form of an English will, and improbable according to the law of Scotland, to fill up and declare the purposes of the trust conveyance, which he had granted of his heritable property in Scotland. Farther, the trust-deed of 1823 was revoked by the will of 1827.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The trust-disposition contains proper disposing words, importing a valid conveyance of real property. It is not revoked by Mr. Dick's last will and testament, which only revokes all *wills* previously executed by the testator, and has no reference to the trust-disposition which is not a will, but a *de presenti* conveyance of real property. The last will and testament is no doubt ineffectual as an actual conveyance of heritable property in Scotland. But it is valid and effectual as an exposition and direction to the defenders of the testator's wishes and intentions as to the disposal of his heritable property in Scotland, which had previously been conveyed to them by the trust-disposition.

Interlocutor of
Lord Ordinary.

LORD MONCREIFF, Ordinary, Found, "That the deed of trust executed by James Dick, deceased, according to the forms of the law of Scotland, dated the 14th of November 1823, was not revoked by the last will and testament, also executed by the said James Dick, dated the 18th of May 1827, or by any other deed, instrument, or act; that the said deed of trust is subsisting, and effectual to convey to the persons therein named, and to the survivors or survivor of them, the whole heritable property of the deceased, situated in Scotland, in which he was vested at the time of his death, subject to the effect of the obligations of trust therein expressed; that it being admitted, that the said last will and testament, dated the 18th of May 1827, and the codicil of 20th November 1827, executed according to the forms of the law of England, where the testator had his domicile, are in all respects valid and effectual to their purposes under that law; and there being no ground for alleging that there is any technical ambiguity in the terms or clauses thereof; the question as to the effect of the obligations of trust, expressed in the said trust-deed, in relation to the testator's property in Scotland, by reference to the purposes specified and contained

in a last will previously executed, or to be specified and contained in any will, codicil, or other writing which the testator might afterwards execute, in the application of the said obligations of trust, to the purposes actually specified and contained in the said last will and testament of the 18th May 1827, and the codicil of 20th November 1827, is a question which must be determined exclusively by the law of Scotland; found it fully settled, as matter of the law of Scotland, that an heritable estate may be effectually conveyed by a trust-deed, in the form of the trust-deed, executed by James Dick, and that the obligations of trust, provisionally created by reference to any will to be afterwards executed, may be effectually perfected and defined by a testamentary deed or will, executed according to the law of the place where the testator is domiciled, though not bearing the forms of the law of Scotland; that, in this case, the provisions of trust in the trust-deed, are so laid down and expressed, as to apply with effect to the purposes specified and contained in the said last will and testament and the said codicil, and that there is no incongruity which can prevent such application; therefore sustained the defences, and assoilzied the defenders, and decerned; but found no expenses due."

CAMERON
v.
DICK'S
TRUSTEES.
1833.

The pursuer having Reclaimed, the Court "Adhered."

LORD GILLIES observed,—“This is an important case patriotically, but not so on account of its raising any question of legal difficulty. There is no part of the law of deathbed involved in it. All the deeds were executed *in liege poustie*. The English will is admitted to be a formal and valid instrument. Ever since the case of Willoch in 1769, it has been held fixed in our law, that a feudal conveyance of heritage, regularly executed according to our forms, and disposing to trustees, to be held by them for such purposes as the granter might express in a separate writing under his hand, either at that or a subsequent time, or which he might have already expressed in a prior writ, is an apt conveyance, and both empowers and obliges the trustees to give effect to the will of the granter, as declared in such separate writing.

JUDGMENT.
May 19, 1831.
OPINIONS.

“We had lately occasion particularly to consider the state of the law on this subject, in reference to the case of Lady Ker.

CAMERON
v.
DICK'S
TRUSTEES.
1883.

The effect of the law of deathbed there gave rise to a difficult question, in which I differed from the opinion of the majority of the Court, to whose judgment I must bow, although I cannot surrender my own opinion. But in regard to the main question, apart from the specialty of deathbed, I have already said, that I conceive it to be perfectly fixed ever since the case of Willoch. So soon as it is admitted that the English will is good and formal by the law of England, we have enough to enable us, and to constrain us, to decide, by the law of Scotland, whether the clause of reference in the Scottish trust-deed, be sufficient to connect it with the English will, and so make an operative conveyance of the Scottish heritage, to the exclusion of the heir-at-law. We cannot go to England to ask a lawyer there, whether the English will, either by itself, or by conjunction with the Scottish deed, can carry heritage in this country? It is here, and only here, that such a question can be answered. I concur without hesitation in the judgment of the Lord Ordinary."

LORD PRESIDENT HOPE observed,—“My opinion is the same. The Scottish deed conveys in trust for the purposes contained in the testator's will to be afterwards executed. Such a will is afterwards executed, containing purposes and directions which are perfectly intelligible, and I hold it to be the same as if these had actually been originally engrossed in the Scottish trust-deed. The effect of the combination of the two deeds is the same as if the last had all along formed part of the first. It is said that a will or testament in our law is always presumed to be on deathbed, and has only the force of a deathbed deed. But this is in one sense inaccurate. It is true, that at whatever date the will was written, it is presumed to have a continuous existence to the last moment of life, and to be in reality the will of the dying man, even *in articulo mortis*. But it is equally true, that if the deed be regularly tested, and we see that it was written at a period of twenty years' distance from the death of the testator, it is the expression of the testator's will *in liege poustie*, and when combined with a prior feudal conveyance, is completely operative and effectual in questions as to heritage. The law of deathbed does not touch the question now before us, and I cannot hesitate to sustain the defences.”

The pursuer having Appealed, LORD BROUGHAM, Chancellor, presiding, "It was Ordered and Adjudged that the interlocutors complained of be, and the same are hereby affirmed."

LORD BROUGHAM observed,—“The case of *Willoch v. Auchterlony* was very much relied upon by the respondents; and it was principally with a view to that case, that the second argument was originally ordered, though it afterwards took a wider scope. Two points were to be ascertained, first, the authority due to that case, whether it had ever been shaken; and secondly, its application to the present question. Upon both these points, after a very full argument at your Lordships' bar, I have no doubt, and the learned Judges, the benefit of whose assistance we had, agreed with me in the view I have taken; first, that that case is still the law of Scotland upon the subject, that it had been acted upon ever since, and that its authority had been recognised repeatedly in subsequent cases by the Judges in the Scottish Courts; secondly, that the case is applicable to the present in a remarkable degree, even down to some of the minute details of both cases; and that it makes the law of Scotland, or at least declares the law of Scotland with sufficient distinctness to form a perfect groundwork for the decision of the case at the bar. Upon these grounds, I have no hesitation in recommending to your Lordships, that the interlocutors complained of should be affirmed.”

CAMERON
v.
DICK'S
TRUSTEES.

1838.
House of Lords'
Journals.
Aug. 29, 1838.

1. The principle established by the case of *Willoch* was most important. Without relaxing the strict form requisite for the transmission of heritage, it enabled a party, by employing the machinery of a trust, to make a settlement of his heritable estate in as simple a form as that applicable to a testamentary disposition of moveables. To persons happening to be abroad, and unable to obtain the assistance of persons conversant with the

forms of Scots conveyancing, this form of making a settlement of heritage was a great boon. A writing expressive of the will of the truster, valid by the law of the place where it was executed, was all that was requisite, provided it was not executed on deathbed. As, too, the right of challenge upon the head of deathbed belongs exclusively to the heir-at-law, the writing was not liable to any challenge on that ground, if the heir-at-law had been

excluded by another deed executed in *liege poustie*, and which deed was not expressly revoked. In such a case, the writing expressive of the will of the granter is valid, although executed upon deathbed.

2. In the case of *FORDYCE v. COCKBURN*, July 5, 1827, the trust-deed, executed in 1814, was conceived "in favour of Mr. Cockburn and Captain Grant, executors named and appointed by me, in and by my last will and testament, dated 3d August 1813, or to such other person or persons as I shall, by any future will or deed to be made or granted by me, nominate and appoint as executors of my last will," but in trust always, and under provision that "they shall pay and apply the same to the person or persons named, and for the uses and purposes expressed, declared, and appointed by the foresaid will made by me, or to such other persons, and for such other uses, ends, and purposes, as shall be expressed, declared, and appointed by me in any other testamentary deed, or other writing under my hand, to be granted by me at any time of my life, or even on deathbed." In 1825, the truster, Mr. Mowbray, executed another deed, which was purely testamentary, and incapable of carrying heritage in Scotland, by which he revoked "all wills and testamentary dispositions by me at any time heretofore made," and declared this to be his last will and testament. Under this will, Mr. Cockburn was also appointed an executor. The Court held that the trust-deed was not revoked by the

will of 1825; and that although Mr. Cockburn was not entitled to take as trustee under his original description of executors under the will of 1813, seeing that will was recalled by the will of 1825, yet he was entitled to take in his character of executor under the will of 1825, seeing that the property was disposed to him as one of the executors under the will 1813, or to such other persons as the truster should nominate and appoint as executors under any future will or deed to be granted by him.

3. LORD JUSTICE - CLERK BOYLE observed,—“It does not appear to me that there is in the will 1825 any declaration of purpose on the part of Mr. Mowbray to recall the trust-deed of 1814. The deed was executed for the very purpose of enabling him to affect the heritable debt by a future will; and though he altered the will of 1813, I do not think the revocation of all wills and testamentary dispositions can possibly include deeds relative to heritable property in Scotland. I am therefore of opinion that Mr. Cockburn, as surviving trustee under that deed, is entitled to an entry.” LORD PITMILLY observed,—“I am entirely of the same opinion. The only point is, How the feudal title is to be completed; and that depends on whether the deed 1814 was revoked by the will of 1825, and I am satisfied that it was not.”

4. In the case of *BRACK v. JOHNSTON*, November 23, 1827, the truster conveyed his heritable property in Scotland to a trustee, with instructions that "at my

death he shall assign and dispo-
ne the whole premises to such person
or persons as I shall specify and
name in my will, or by any sepa-
rate writing or letter to that effect,
and it shall be sufficient to my trust-
ee to dispo- the same accordingly,
although such writing or letter hath
not the legal solemnities of a deed."

In 1823, he executed a will accord-
ing to the forms of the law of
Jamaica, and not probative, or
capable of carrying heritage by
the law of Scotland. This will
revoked "all wills formerly made,"
and contained the following clause:
—"Item, I give and bequeath to
my nephew, Adam Hogg, the re-
sidue and remainder of my pro-
perty, real, personal, and mixed,
consisting of lands, houses, &c.,
in Berwickshire, Great Britain,
and of Roxburgh Castle, with the
slaves, stock, &c., in this Island."
The Court sustained the trust-
deed, and held that the will after-
wards executed was also effectual
as a declaration of intention and
instruction to his trustee relative
to the disposal of his heritable pro-
perty after his death.

5. LORD PITMILLY observed,—
"Then, if the trust-deed is valid,
although not delivered, the next
question is, What effect is to be
given to it? and there can be no
doubt but that, on the infestment
of the trustee, it must have de-
nuded the truster, and that the
trustee's right was completed by
his infestment. Now, if no direc-
tions had been given, the conse-
quence would have been, that the
truster was denuded, and the trust-
ee would have held for behoof

of the heir-at-law, and it would
have been incompetent and unne-
cessary for the heir-at-law to serve
in order to take it up. Then the
remaining question is, Of what
effect is the testament? Now, as
to that, I think it is just to be re-
ceived as a direction to the trustee
for the fulfilment of the purposes
declared in the first clause of the
trust-deed. No doubt, it does not
refer to the trust-deed, but it was
not necessary to do so; for it was
a direct will, and that was what
was provided in the trust-deed,
and that the trustee was to convey
to the person named in the will.
It is said that the will revoked the
trust-deed, because it revoked all
prior wills; but so far from doing
this, it was just carrying into effect
its purposes, and a completing of
what the truster had in view; and
I cannot distinguish any thing in
principle between this and the case
of Auchterlony. It is very true,
that if the will had been executed
on deathbed, it would have been a
very different question, because the
heirs-at-law are not excluded by
the trust-deed, and might therefore
have set aside the settlement; and
this is the principle of the decision
in the case of John Duke of Rox-
burgh, and I have complete evi-
dence of that in the notes which I
have of the opinions of the Judges."

6. LORD GLENLEE observed,—
"I confess that I am not quite
satisfied that this deed should be
sustained as effectual to defeat the
right of the heir-at-law. It seems
to be admitted, that whatever might
have been the form, the deed must
have been executed in *liege poustie*.

But why should the objection of deathbed, which applies only to heritage, be competent to the heir, when his interest is not excluded, if it be not competent also to make use of the equally strong plea, that the estate has been carried away from him by an improbativ deed? And if the objection on deathbed be competent, why should not every other objection founded on our rules relative to the conveyance of heritage be also competent? As to the case of Auchterlony, it is explicitly stated in the report, as the ground of decision, that the interest of the heir was put an end to by the trust-deed. This may not be a proper assumption of the fact in that case; but the question was not gone into, and it is assumed to be the case. But, besides, there is a difference between the trust-deed in Auchterlony's case and that here. In Auchterlony's, the trustee was to pay debts and legacies already granted or to be granted, and there is nothing from beginning to end of the report that shows that the trust-deed was not delivered. On the whole, therefore, as the heir's right was not defeated by the trust-deed, and as it was quite competent for him to state all objections to the mode in which the heritage was conveyed away from him, I am not satisfied that this will is effectual."

7. LORD JUSTICE-CLERK BOYLE observed,—“ I think it is apparent, from the report of the case of Auchterlony, that there was no delivery there. The only remaining question is, Whether the will, executed according to the forms of

the law of England, is sufficient to carry into effect the purposes of the trust-deed? It is said that it revoked all wills, and that this trust-deed is cut down by it; but I cannot arrive at that conclusion. The recalling of all wills cannot possibly extend to this trust-deed, and as to that we have a decided precedent in the late case of Fordyce. It is pointedly stated, that the will in the case of Auchterlony was an English will. It is of little consequence, however, whether it was an English or Scotch will, as it is simply a will, and not a conveyance of heritage, according to the law of Scotland. But the trust-deed here reserves the power to name by a will, or any separate writing or letter, though with the legal solemnities of a deed. Now, under that reserved power, it would not be necessary that it should be authenticated according to the law of Scotland. A writing of a much more informal purpose than the one here would have been effectual. And there being here a will perfectly authentic by the law of Jamaica, it is quite sufficient, and it is not necessary that it should refer to the trust-deed; nor do I think a case more on the principle of that of Auchterlony than this can be imagined; and as the validity of that case has always been acknowledged, we cannot now disturb it. But we certainly decide this without reference to the argument as to the law of deathbed, which is entirely out of the case here, and as to which I reserve my opinion.”

8. The pursuer having Appeal-

ed, the judgment of the Court was affirmed. LORD LYNDHURST observed,—“ I further think that as far as relates to the will, it was intended by the party to be an execution of the power contained in the first deed. The question that remains then is, Whether the mode of execution was sufficient? If the mode of execution was sufficient, then there is an end of the question. I can hardly distinguish this case from the case of Willoch. It was considered at that time a question of very little doubt. Under such circumstances, I move your Lordships that this judgment be affirmed, but without costs.”—*House of Lords' Cases*, February 25, 1831.

Where a Truster declares the purposes of a Trust in a Writing apart from the Trust-Deed, the Writing must be in a probative form, unless acknowledged and referred to by the Truster in that or some other Probative Deed.

I.—DUNDAS v. LOWIS.

IN 1804, Mrs. Margaret Houston executed a settlement, by May 18, 1807. which she conveyed her whole property to trustees. After appointing various legacies to be paid, the deed contained the following clause,—“ That my said trustees shall hold any additional directions which I may give them by a writing under my hand as part of this trust-deed.” NARRATIVE.

Subjoined to the trust-deed there was a codicil in these terms :—“ In addition to the legacies abovementioned, I hereby direct my said trustees to pay to the before designed Robert Forrester, the sum of £50 sterling at the term when the other legacies are paid ; and I appoint this codicil to be recorded along with my settlement.” This codicil was written by the same person who wrote the trust-deed ; was signed by the truster the day after the date of the trust-deed, but was not tested by witnesses.

In 1805, the truster executed another codicil on a separate paper, which was signed by her, and properly tested. By this codicil she revoked her former settlement, in so far as she had directed her trustees to pay the residue of her estate to her two nieces, Misses Agnes and Magdalene Lewis ; and she appointed

DUNDAS
v.
LOWIS.
1807.

her niece, Miss Agnes Lowis, her sole residuary legatee. Subjoined to this codicil were these words :—" I desire my Royal Bank stock to be given to Miss Jane Houston Dundas." These words were in the handwriting of the same party who had written the codicil, and were subscribed by the truster, of the same date with the codicil, in order to supply an omission which she conceived she had made in the codicil.

As neither the bequest of £50 to Mr. Forrester nor the bequest of the bank stock to Miss Dundas were either holograph of the testatrix, or attested by witnesses, a process of multipointing was brought in name of the trustees by the residuary legatee.

ARGUMENT
FOR LEGATEES.

PLEADED FOR THE LEGATEES.—The whole property of the truster, heritable and moveable, was completely vested in the person of her trustees, by a deed executed in the most formal and regular manner. By this deed the trustees are bound to obey and carry into effect any directions which the truster should give them in writing, in the same manner as if these directions had constituted a part of the trust-deed. If the truster had put the trustees in possession of the bank stock in question during her lifetime, and had directed them to transfer it to the claimants, they must have obeyed her directions. The same consequence must follow, although the trust-deed was only to take effect after her death.

The clause in the trust-deed appears to have been framed for the express purpose of preventing any such question as the present from arising. Such a clause would have been wholly unnecessary if it could only apply to regular and formal deeds. With such deeds the trustees could not possibly refuse to comply. The clause authorizes them to follow directions given by a writing under the truster's hand. As therefore the codicil in question was a writing under the testator's hand, the trustees are necessarily bound to give it effect.

The maxim of law with regard to settlements is—VOLUNTAS TESTATORIS EST SUPREMA LEX. No doubt can be entertained of the intention of the truster in the present case. Her intention is clear, from the directions signed by herself. It would be altogether a different question, whether these directions were suf-

ficient to vest the property. The property, however, had been previously completely vested in the trustees by a regular deed, and they were bound to follow any directions which the truster might give them by a writing under her hand.

DUNDAS
v.
LOWIS.
1807.

LORD HERMAND, Ordinary, "Repelled the claims of Miss Dundas and Mr. Robert Forrester, founded on the unauthenticated codicils."

First Interlocutor of Lord Ordinary.
Nov. 21, 1806.

On advising a Representation for Miss Dundas, with Answers, his Lordship Found, "That by a trust-deed duly executed, with all the solemnities of law, the late Mrs. Houston vested her whole property in trustees for certain uses therein declared: That this deed reserved the power of alteration, and provided that the trustees should hold any additional directions she might give them as to the disposal of her property by a writing under her hand as a part of the trust-deed: That upon 13th June 1805, Mrs. Houston so far altered her original settlement, as to appoint her niece, Miss Agnes Lowis, her sole residuary legatee; and that this codicil was duly executed; but that the separate codicil, upon which the representer founds, is not holograph, and is destitute of date, writer's name, and subscription of witnesses, so cannot be set up as an alteration of the former regular settlement. Refuses the desire of the representation, and adheres to the former interlocutor."

Second Interlocutor of Lord Ordinary.
Jan. 16, 1807.

On a Reclaiming Petition being presented by Miss Dundas, the Court "Adhered."

JUDGMENT.
May 18, 1807.
OPINIONS.

On the Session Papers LORD PRESIDENT CAMPBELL has written—"Codicil. Interlocutor right. Paper of directions may be sustained as Will, but then it must be formally executed."

MS. Notes.
Sir Ilay Campbell's Session Papers.

II.—INGLIS v. HARPER.

In 1826, Mrs. Margaret Matheson executed in favour of the defender, who otherwise would not have succeeded to any part of her property, a deed of settlement, by which she appointed

Oct. 18, 1881.
NARRATIVE.

INGLIS
v.
HARPER.
1881.

the defender her sole executor, subject to the payment of her lawful debts, "and subject also to the payment of such bequests as I may instruct him to pay, in a letter signed by me, of this date, to the several persons therein named." On paying these legacies, the whole residue was declared to belong exclusively to the defender.

The deed of settlement was duly tested ; and on the death of the testator, which happened two days after its execution, it was found in her repositories, and within it a letter of the same date with the will, bearing to be signed by the testator, but it was neither holograph nor tested. The letter was addressed to the defender, but the address was not in the handwriting of the testator. It was as follows :—"DEAR COUSIN,—Referring to my testament of this date, whereby you are named and appointed my sole and only executor, under burden of paying my just debts and the following legacies, which I desire and require you to pay within three months after my death." Then followed seven different bequests, all numbered successively, and *inter alia*, "First, To William Inglis, Esq., Writer to the Signet, or his heirs, £1000." The letter containing the bequests was written on two pages of the same leaf, and signed on the last page only. It was written by the same party who wrote the settlement, and was alleged to have been signed by the testator, *simul et semel* with the settlement, and in presence of the witnesses who attested the subscription of the testator to the settlement.

Founding on the will and the letter as that therein referred to, the pursuer raised an action against the defender for payment of his legacy. The defender refused to admit that the letter founded on was subscribed by the testator; and he pleaded, that not being probative under the Act 1681, it could not be received as evidence of the will of the deceased, and that this defect could not be supplied by parole evidence.

ARGUMENT FOR
LEGATEES.

PLEADED FOR THE LEGATEES.—The testatrix, by her settlement, obliged her executor to pay such legacies as she might instruct him to pay, in a letter signed of the same date with the settlement. A letter was accordingly signed *simul et semel* with the settlement, and was found with the settlement itself on opening the repositories of the testatrix. The executor, there-

fore, cannot approbate and reprobate the deed under which he acts ; and he is as much bound to give effect to and implement the conditions of the letter as he is bound to implement the settlement itself. The defender succeeded to the deceased only by virtue of the settlement. A stranger taking benefit by a will, must fulfil the testator's intentions. His doing so is a condition of the grant in his favour, and he cannot take under the will except in virtue of fulfilling that condition. A testator may impose any burden he chooses on a stranger executor. He may, therefore, impose upon him the burden of paying legacies which he may bequeath by an improbate deed. Granting, therefore, that the will here implies nothing more than a power to declare legacies by a letter signed by the testator of the same date with the will, that power has been executed strictly in terms of the will. By using the term "letter," the will excludes the idea of a tested deed ; and by using the term "signed" merely, it shows that even a holograph letter was not intended as the only mode by which the legacies should be declared. The defender, therefore, cannot challenge this exercise of the power, without approbating and reprobating the will of the deceased.

The will and the letter, however, truly import, not a power to declare legacies at a period future to the execution of the will, but an instant constitution of legacy. The legacy is constituted by the will, which is a regularly tested deed ; and reference is made, by certain clearly distinctive marks, to a letter which, from the terms of the will, must necessarily have been already prepared, and which was executed *unico contextu* with it, merely as specifying the measure of the legacy. But it is not essential that the complete specification of the legacy, either as to the person or the sum, should appear within the tested deed itself, if there be any certain means provided in it for ascertaining the nature of the legacy.

The will of a testator may be sufficiently declared in a probative deed by a reference for the measure of it to a separate writing, which, if it can be established to be the very writing referred to, does not require the formalities of the Act 1681 as a solemnity. It comes, therefore, to be a mere question of identification, which may be established *prout de jure* ; and if the circumstances already made out in this case do not prove the

INGLIS
v.
HARPER.
1881.

INGLIS
v.
HARPER.
1881.

identity of the letter founded on with that referred to in the will, proof of the circumstances averred in the condescendence ought to be allowed,—parole proof to supply defects in a will having been permitted, in much less favourable circumstances, in the case of *Pollock*, and in that of *Norvel v. Ramsay*.

The case of *Dundas v. Lowis*, founded on by the defender, differs from the present in two important particulars. *First*, The power to give additional instructions there, was in order to provide for a change of will, and was clearly a power to give new instructions at a future period, while here there is an instant declaration of will, and the letter is merely referred to as containing the specification of that will, so declared in the tested deed : *Second*, In the case of *Lowis*, the testator merely reserved power to give additional instructions “by a writing under my hand”—a technical phrase held to imply a writing probative in law, there being no indication of an intention to dispense with the statutory solemnities ; while the writing here referred to is described as a “letter” which is never tested, and as merely “signed”—thus allowing of a letter not holograph.

ARGUMENT FOR
EXECUTOR.

PLEADED FOR THE EXECUTOR.—A testator cannot reserve a power, contrary to the statutory law, of leaving legacies by an improbate deed. Indeed, there are no legal means of identifying a writing of importance, such as a letter bestowing legacies of the amount here in question, except by observing the solemnities of the Act 1681. Besides, the reservation to appoint legacies in a letter “signed” by the testator must be construed as accordant with law, and as meaning a letter duly signed ; and so the rule of approbate and reprobate does not apply, as the testator left no letter signed in terms of law.

Neither do the terms of the testament, according to their true construction, import an instant declaration of will, as if the mind of the testator had been then fully made up. It merely provides for the declaration of a will to be formed at a future period, though within the same day. It is incompetent, and would be attended with the most dangerous consequences, if writings imposing burdens on executors were allowed to be reared up by parole, or by any proof except that provided by the Statute 1681.

The case of *Dundas v. Lewis* clearly rules the present. In that case, as in the present, there was merely a power to declare a future will ; and on the same principles on which the words “ a writing under my hand ” were construed to mean a probative writing under my hand, so must a “ letter signed by me ” be held to mean a letter duly signed according to the forms of law.

INGLIS
v.
HARPER.
1831.

LORD MEDWYN, Ordinary, found,—“ That the offer of proof contained in the condescendence, was not relevant to supply the want of the statutory solemnity of writs, and assoilzied the defender.”

Interlocutor of
Lord Ordinary.

In the Note to his interlocutor, the Lord Ordinary observed, —“ The Lord Ordinary cannot adopt the interpretation of the pursuer, that the latter will constitutes the defender executor under burden of paying such bequests as the testatrix shall direct in a letter not written, but merely signed by her, and so the question does not arise whether it be competent to provide that legacies may be constituted in an informal or an improbativ writing. It seems quite impossible to distinguish this case from that of *Dundas v. Lewis*.”

Note of Lord
Ordinary.

The pursuers having reclaimed, the Court “ Adhered.”

LORD GLENLEE observed,—“ I have no great doubt of adhering. I have always understood that testamentary deeds, though informal writings, if duly authenticated in essentials, may be sustained, still the essentials must appear. Had the names and sums in this letter been in the woman’s own handwriting, the letter might have had effect. A reference in a testament to a writing already executed, and referred to in the testament, is certainly a case different from this. We must take the words of the testament, which are legacies which she ‘ may instruct ’ the executor to pay. This expression ‘ may ’ shows that she had not then made up her mind. If her mind was made up, why were the legacies not inserted in the will ? As to its being a letter merely signed, the words do not bear that it should be holograph, or more formally docqueted by herself, as referred to in her will. It is signed, too, only on the last page. Perhaps this is of no consequence, if a proof of the identity were allowed ; but it is a circumstance that the principal

JUDGMENT.
May 27, 1828.
OPINIONS.

INGLIS
v.
HARPER.
1831.

legacies are on the first page. Such a proof, if allowed, might give room for fraud. I think it odd that the date of the letter is in words, and not in figures. This shows that something more than an ordinary letter was intended. Why, then, was it not tested? It would require a good deal of consideration what else would be sufficient. The case of Norval against Ramsay rather makes against the pursuer; for there the legacy was complete, and the proper address was only wanting. The address was not holograph, but it was allowed to be proved. But this is not the case before us. I cannot distinguish this case from that of Lowis, and I am therefore for adhering."

LORD ALLOWAY observed,—“ I have seldom had more difficulty than in the present case. If I could agree that it was ruled by the case of Lowis, I would follow that decision; but I think that there is a clear distinction. I cannot see a motive for the manner in which this will has been executed,—it being clear, from the limiting the letter to that particular date, that the testatrix had then made up her mind. But be that as it may, we must consider the legal effects of the will. The testator's intention is always the question in matters of will. If we can allow that the letter was signed by her, and if proof of the averments can be admitted, there cannot be a doubt of the will. But the question is, Whether the statements are relevant, the letter not being probative? We must consider whether, in a settlement to a stranger, the testator may not insert any conditions he chooses. Can he not state—My condition is this: you shall be bound to pay legacies contained in a letter signed by me, though not probative. Then I would ask, how can the stranger get the better of the condition on the ground that it is not probative? If there is anything in the principle of approbate and reprobate, he must comply with the conditions, if he takes under the will.

“ I have not found any case in which the Court decided this, though there is one which comes very near it, viz., the case of Melvin, where the Lord Ordinary found that the executor was bound to pay legacies contained in any writing under the hand of the testator, however improbate; but the Court altered on another point. I should hesitate to find that such a will could not be supported against a stranger. If this be law, the case stands on very strong grounds. This is called a letter in

the will, and could it be imagined that it was intended to be holograph? In the case of *Lowis* the word 'writing' was used, which means probative writing; but 'letter' does not mean a probative writing. As to the letter being signed only on the last page, I never heard of a letter being signed in a different way; and therefore I lay that aside, as I conceive it to be a letter in the ordinary use of the language; and I must entertain the opinion, that the stranger must obey the conditions imposed upon him in the will.

INGLIS
v.
HARPER.
1831.

"We have gone a great way in sustaining defective settlements, as in the case of *Panton*, in which we carried the matter nearly as far as is asked here. The settlement was made on the 15th of May:—the testatrix died on the 17th, and it is alleged that the letter was executed at the same time; and the letter and will were put up together, and the letter found within the will after the testatrix's decease. The whole question turns on the point of law, whether the pursuer is entitled to stipulate on the stranger executor that he may appoint legacies by letter, though not probative? When she inserted this clause, she could not mean a holograph letter, by which it was always in her power at common law to leave without any reservation, but to reserve power to bequeath by letter not holograph."

LORD JUSTICE-CLERK BOYLE observed,—“The question is this—Whether, looking to the will, and the power reserved to do what I must hold was not done when the testament was executed, it can be done by an improbative letter? The will bears that the executor is to be burdened with the payment of ‘such bequests as I may instruct him to pay in a letter signed by me of this date.’ Giving the plain meaning to this, I think that the testatrix must have looked forward to instructions to be granted, which were not then granted. I cannot put on it the construction that it was already done. No doubt, the letter is limited to be of that particular date; but it also refers to the testament as executed, and thus bears to be posterior in execution; and we cannot listen to the argument that it was already existing, or executed *unico contextu*; for the will is prospective, and the letter refers to the will as executed.

“Then, in this view, I do not think that the question is of such difficulty. Is that letter such a document as can be sus-

INGLIS
v.
HARPER.
1831.

tained, either as it stands, or coupled with the offer of proof? I cannot arrive at the certainty that this will contemplated an unauthenticated letter. It does not exclude a holograph letter like that contemplated. We see this woman did write letters with her own hand ; but still, if able only to subscribe, we cannot hold that the letter intended may not have been a letter to be tested. Then the writer of the letter is the principal legatee ; and when that is the case, I do not think that the Court is called upon in any way to relax the rules of strict law. The date and year in the letter are at full length in writing. Then what was to prevent this letter being completed in the same manner with the deed itself? It is clear that there is nothing in the will exclusive of the letter contemplated being either holograph or tested ; and if we resort to conjecture, I think that a ' letter signed by me ' means as much a formal letter as a deed signed by me means a formal deed.

" Then the question comes to be, that when the letter is written on two pages, and all the principal legacies on the first page, where there is no subscription, are we to admit the proof offered to supply what is wanting? I enter into the view of Lord Glenlee, that there are principles which would go to disregard mere informalities, if there were proper evidence of the will ; but in no case, where there was neither a holograph nor probative deed, has effect been given to it. We are bound to require the law to be satisfied by proof of the will.

" Nor can I lay out of view the judgment in the case of *Lewis v. Dundas* ; and I cannot see any distinction as to the relevancy of the averments regarding the documents put up with the will. The case of *Dundas* was much stronger, as the codicil was on the face of the deed itself, and so there could be no doubt of its identity. The reservation there was to leave additional instructions by ' a writing under my hand ; ' and I do not think there is any essential difference between that and a ' letter signed by me. ' The true meaning is a writing according to what the law requires, and I think the letter is in the same situation. The writer of the will and codicil was the same in the case of *Lewis* ; but, because there were no witnesses, it was decided that no effect could be given to it.

" I can arrive at no other conclusion, than that the principle

of the case of Lowis must rule this, and that the parties founding on this letter are in the same situation with Miss Houston Dundas claiming on the improbativè codicil there. I cannot comprehend why, if this woman's mind were made up, it was not inserted in the will. We must apply the established rule of law, that the exercise of reserved powers must be done according to law. The danger would be extreme, if we were to allow the proof that has been asked. In Ramsay's case, the only thing wanted was the address. Suppose there were two letters, contrary to each other, of the same date; are we prepared to say that we would allow a proof and a common issue? The danger would be fearful, and we cannot listen to it; and the being a stranger executor does not, in my opinion, alter the matter."

INGLIS
v.
HARPER.
1831.

The defender having Appealed, "It was Ordered and Adjudged, that the interlocutors complained of be reversed. And it was farther Ordered, that the case be remitted back to the Lords of Session of the Second Division in Scotland, with directions to submit to a jury, to consider whether the letter bearing date, Edinburgh, 15th May 1826, and purporting to be a letter from Margaret Matheson to James Harper, Esq., and by which the said James Harper is directed to pay to William Inglis, W.S., or his heirs, £1000 sterling, was signed by Margaret Matheson on that day, and is the letter referred to by the will of Margaret Matheson."

JUDGMENT.
House of Lords.
Oct. 18, 1831.

At the First advising of the case in the House of Lords, LORD WYNDFORD observed,—“When your Lordships perceive that the judges in the Court below, whose minds are constantly engaged in the consideration of Scotch law, differed in opinion upon this case, you will not expect that I should be immediately prepared to deliver an instant opinion upon that on which they have doubted. This is a case certainly also, in itself and in its consequences, of importance. The point will ultimately come, in the first instance, to this—whether or not, though an instrument cannot stand as a probative will, as a will *per se*, it can receive that kind of support from another instrument which is duly executed, to give it the effect contended on the part of the appellants. As the decision on this question may tend to the establishment of principles of great importance in other cases,

OPINIONS.
House of Lords.

INGLIS
v.
HARPER.
1881.

and it is fit also to look into those decisions to which we have been referred in the Scotch law, I shall move your Lordships that the further consideration of this case be adjourned."

LORD ELDON observed,—“My Lords, the nature and importance of the case, as well as the fact of the difference of opinion among the judges in the Court below, makes it, in my judgment, extremely fit that we should concur in the motion which has been submitted to your Lordships, that this judgment should be postponed. One or two circumstances I will just mention, for the purpose of throwing them out of the case. In the first place, some suspicion of fraud has been stated at the bar, with respect to the conduct of one of those persons, who is mentioned in the second paper as a legatee. I throw that entirely out of the question; because, unless I mistake the nature of the proceedings, no such question can be said fairly to be before us; it is not properly brought before us.

“With respect to another question, my Lords,—I mean, what is the effect of this paper with respect to the executor taking the whole of those sums which are called legacies and bequests? It does not appear to me that we can now decide what the effect is of making a person sole executor and intromitter, where there is afterwards an express bequest to that sole executor and intromitter of so much of the property as he is required to pay in discharge of other sums intended to be given. That, I think, is not a question now before us, according to the form in which this case is presented to us. All that I wish to state upon those two questions is, that I can at present give no opinion upon either of them. But the question, whether this paper, by reason of the reference to it, is a paper which can or cannot be claimed upon by these legatees, is a point on which I shall be able fully to deliver my opinion when this case is resumed.”

OPINIONS.
House of Lords.

At the Second advising of the case, LORD WYNDFORD observed,—“This case comes before your Lordships by appeal from a decision of the Court of Session in Scotland. A noble and learned friend of mine, who for many years assisted in the decision of Scots appeals, was present when the case was argued, and concurs with me in the judgment I shall recommend your Lordships to pronounce. The questions for your Lordships to decide will be, Whether, although a paper be not

by the law of Scotland *per se* probative, if it be referred to by a will regularly proved, and that will declares that the person to whom the will, in the first place, entrusts her property, shall dispose of it in the manner directed by that paper, such paper is not to be received to ascertain the trusts on which the estate is given ? and, Whether the person who takes under the will is not bound to execute the trusts so ascertained ?

INGLIS
v.
HARPER.
1881.

“ Your Lordships will perceive, that if such a paper cannot, under these circumstances, be received in evidence, and have the effect of directing the distribution of a deceased’s estate, the intention of such deceased must be defeated ; and a person who is only a trustee for others may take the whole beneficial interest to himself, to the prejudice of those for whom the deceased intended it. Your Lordships will find that such will be the case in the present instance, with regard to a very considerable part of the property of the testatrix. This may be hard : it may be unjust ; but if it be according to the law of Scotland, I would not advise your Lordships, sitting judicially for the purpose of doing what you may consider justice, to decide against the law. But I have great satisfaction in saying, that, although the Court below determined that such was the law of Scotland, that Court was not unanimous. One very learned Judge, Lord Alloway, differed with his brethren ; and so far from this decision under appeal being in accordance with any settled rule of law, the balance of authority is against it.

“ A Mrs. Matheson by her will, regularly attested according to the law of Scotland, gave all her property to the respondent, to which bequest those words were added :—‘ Subject always to the payment of such bequests as I may instruct him to pay, in a letter signed by me, of this date, (that is, the date of her will,) to the several persons therein named, which bequests or legacies I expressly will and declare are a real and effectual burden upon my executry funds : second, I declare that after these several persons therein named, have been paid and discharged their several legacies, the whole residue shall belong exclusively to the said James Harper.’ Your Lordships perceive that the respondent’s share of her property is not to become vested until after the payment of those legacies. You can find nothing in the will to show what is the amount of the

INGLIS
v.
HARPER.
1881.

legacies given by it, or who were the objects of the testatrix's bounty. To ascertain those things you are referred to her letter, and without looking at that letter this will cannot be carried into execution. If I had found that I could not look at the letter, I should have been disposed to hold the will inoperative; I should rather have thought that the property should have been divided amongst the testatrix's kindred, than that it should be kept by a person who might not be beneficially entitled to one shilling of it, for the testatrix might have intended that all of it should be paid over by the respondent to other persons.

"The appellant offered to prove that a letter of the date of the will was signed by the testatrix at the time that the will was executed, was then wrapped up in the will, was kept by the testatrix until her death, and was, at her death, found wrapped up in the will. This letter refers to the will, and directs the respondent to pay several legacies to different persons; and amongst those legacies, one of £1000 to the appellant. The Court of Session say, by their judgment, that this paper not being executed as a will, they cannot look at it; they reject the proof offered, and allow the respondent to keep the property bequeathed without performing any of the conditions upon which it was given to him.

"If a paper, which is not *per se* probative, be referred to, and effect given it by one that is so, why should it not be received and acted upon? The danger of acting on an improbative paper is removed by its genuineness being acknowledged by a probative one. The law which requires the attestation of wills is satisfied. The intention of a testator, which must, if that course be not taken, be defeated, is effectuated, and great injustice prevented.

"The case relied on in the Court below is that of *Dundas v. Lewis*. Lord Alloway distinguished that case from the present. His Lordship says, in *Dundas v. Lewis*, the trustees were to follow the directions given them by a 'writing,' and that writing, by the law of Scotland, meant a formal and probative writing. In this case the trustee is to follow the directions given by a 'letter;' and that not one letter in a thousand is probative. I must observe to your Lordships that, in *Dundas v. Lewis*, the

paper proving the legacy disputed was not written until some time after the making of the will ; and that in the intermediate time the testatrix had given two legacies by a paper regularly attested. This confirms Lord Alloway's observations, and shows that by paper was meant a probative paper. The testatrix in the present case left no testamentary paper behind her but her will and the unattested letter.

INGLIS
v.
HARPER.
1881.

"But the case of *Dundas v. Lewis* is met by that of *Melvin v. Nicol*. A settlement was made in favour of a daughter, on the condition of paying such legacies as the settler had bequeathed, or might thereafter bequeath, by any writing under his hand, however informal. The Court decreed the payment of a legacy contained in a holograph letter of the testator. The principle established by that decision is, that a regular instrument gives effect to one that is irregular ; so, in the present case, the probative will gives effect to the improbativ letter. I cannot, on principle, distinguish this case from that now under your Lordships' consideration.

"I therefore humbly submit to your Lordships, that the Court below should have received the evidence offered. How far that evidence will satisfy a jury that this is the paper referred to by the will is another question. With respect to one of the legacies, there are circumstances that a jury will look at with great jealousy : I allude to that which is given to the person who wrote the letter. In England, a jury would require cogent evidence before they would affirm a legacy given to the framer of a will. But this is not the case now before your Lordships. I advise your Lordships to reverse the interlocutors complained of, and remit this case with directions to submit it to a jury."

1. In the case of *DEMPSTER v. WILLISON*, November 15, 1799, the truster reserved power to alter and declare farther purposes, by any other deed or writing under his hand, which deed or writing, if holograph, was declared to be

binding on his trustees, although it might be deficient in any of the other forms prescribed by law. A draft of another deed was afterwards prepared, making some alterations on the prior deed. On the last sheet of the draft an im-

probative docquet was subscribed by the truster, bearing that he had heard the deed read over and approved of it. The deed was then extended, and on being brought to the truster for subscription, he signed the first page, but in subscribing the second he became so much indisposed as to become incapable of proceeding, and he did not afterwards recover. In an action at the instance of the legatees, favoured by the second deed, the Court found that the second deed was ineffectual.

2. On the Session Papers in the case, LORD PRESIDENT CAMPBELL has written,—“Writ. Informal Declaration of Will. Although the succession in general consisted partly of heritage, partly of moveable estate, the deed in question was entirely of the nature of a testament, the estate itself having already been conveyed by a proper and formal deed in *liege poustie* with reserved power. This could have been done by any kind of probative writing, *e.g.*, by a missive letter holograph. Testamentary deeds or latter wills favoured by the law. The difficulty here is, that there is nothing at all probative, yet the evidence of will is very strong. The very purpose of making him sign the docquet to the scroll must have been to authenticate it as a proof of his intention.”—*MS. Notes. Sir Ilay Campbell's Session Papers.*

3. In the case of RANKEN v. REID, February 7, 1849, the truster directed his trustees to apply the residue of his estate to such uses as he should appoint by any deed,

letter, or memorandum of instructions, to be executed by him at any time of his life, and even on deathbed. After the execution of the settlement, the truster executed various codicils, or other papers of a testamentary nature. Among these was a codicil which was subscribed by the truster, but was not holograph or tested. In an action raised by the trustees, the Lord Ordinary found that the codicil being neither holograph nor subscribed before witnesses, cannot be sustained to any effect in the present competition, and on a reclaiming petition the Court adhered.

4. LORD JUSTICE-CLERK HOPE observed,—“I should be sorry to have it supposed that I had any doubt in this case. It falls under the ordinary rule as to the authentication of signatures under the Act 1681. It must either be brought under the exception of a holograph writ, or be tested. No doubt questions will sometimes occur, not as to the authentication of the signature, but as to the identity of the paper as referred to in the will. The matter in dispute in the case of Harper, was the identity of the writing as that referred to in the will. It may often occur in contracts that a specification, neither holograph nor tested, is recognised in the contract as a part of it. But there is no recognition of this codicil in this settlement. Here, apart from the support which is said to be got from the will, it is not said that this writing ought not to be holograph or tested.

5. “And how is the signature to

be established to be that of the testator? If you look at the paper, how is it to be proved to be his deed? It is easy to say that that may be established by evidence, but we must recollect the principle laid down in the case of Keddie, where it was plain on the face of the writing that a name should have been John or James, and it had been so altered by the testator, but the alteration had not been acknowledged in the testing clause. Lord Moncreiff thought that to be so special a case, that a proof might be allowed; but the House of Lords thought it important that there should be one fixed and imperative rule. The principle of this case goes far to show that you cannot take any thing as the writ of the party but what is holograph or tested. Are we now to supersede the acknowledged law of Scotland, and send to a jury the question of, whether this is the signature of this party? If there had been a writ referred to in the body of the will, then there would have been a question not so much of subscription as of identity. But how can we give effect to this as the writ of Rankine? It may be a different case, where a settlement says, that any writing, however informal, is to be taken as the expression of the testator's will; but that case is not now before us. I am of opinion that this is a writing which we cannot hold to have been executed by the testator."

6. LORD MONCREIFF observed,—"This is a writing which requires to be duly authenticated, and it is neither holograph nor

tested. The case of Dundas is directly in point. It will not do to say that this is not an alteration of the prior settlement; it is clearly an alteration."

7. A trustor sometimes reserves a power to alter his settlement, or to give farther instructions to his trustees by any writing, however informal. It may be doubted whether, notwithstanding such a reservation, an improbativ writing would be sustained by the Court. The policy of the law is to refuse effect to all writings which are not evidence of the deliberate act of the granter. If a writing is not probative, the Court are not at liberty to read it, and consequently their power cannot be exerted to enforce it. In the case where the improbativ writing is to the prejudice of the legal heir of the trustor, little difficulty, it is thought, would be felt in refusing to give effect to such writing. The difficulty chiefly arises in the case where the party favoured by a prior probative deed is a stranger, and where it may be thought that taking under a deed in which a power is reserved to give farther directions by an informal writing, he is bound to give effect to the condition of the grant in his favour. But even in this case the safe course would appear to be to refuse effect to the improbativ writing. Being improbativ, it affords no evidence in law of the wishes and intentions of the testator. The maxim of law seems to apply to such a case, *Pactis privatorum non derogatur juri publico*. A reserved power ought to be

exercised *habili modo et tempore legitimo*, and the aid and authority of a court of law ought not to be interponed to enforce writings, the granters of which refuse or neglect to observe the solemnities required by the law.

8. In the case of *MELVIN v. NICOL*, May 20, 1824, a father executed a deed of settlement in favour of his daughter, under burden of such legacies as he might leave

by any writing under his hand, however informal. The question, however, did not arise whether an improbativ writing would have been sustained, as the writing founded upon by the legatee was a holograph letter by the testator, addressed to his wife, empowering her to uplift £100, and stating, that he left £50 of it to the pursuer. The Court sustained the claim.

A Conveyance of Land to Trustees subject to uses to be afterwards declared, is not sufficient to displace the Heir of Investiture, although the Trust-deed is executed in liege poustie, and a subsequent declaration of uses will not operate to the prejudice of the Heir of Investiture, if it is executed on deathbed.

I.—*KERS v. WAUCHOPE.*

Feb. 21, 1812.

NARRATIVE.

In 1790, John Duke of Roxburgh executed a general settlement, by which he conveyed to his sisters, Lady Essex and Lady Mary Ker, all the heritable and moveable estate then belonging, or which should happen to belong to him at his death. In this deed he reserved to himself power at any time of his life, and even on deathbed, to revoke or alter the deed in whole or in part, and to sell, burden, or otherwise dispose of the whole estate, heritable and moveable, thereby disponed, or any part thereof.

In 1803, his Grace executed another deed, by which he conveyed to the defender his whole unentailed heritable property, and also his whole personal or moveable estate in trust, for the uses, ends, and purposes therein specified. The disposal of the residue was directed in the following terms :—“ And lastly, the whole residue, remainder, and surplus of my said estate and effects, shall be conveyed and made over, or applied or employed

by my said trustees or trustee acting for the time to and in favour of such person or persons, or for such uses or purposes as I have directed or shall direct by any deed, missive, memorandum, or other writing executed or to be executed by me for that effect at any time of my life, and even upon deathbed, with the formality of which deeds or writings I hereby dispense."

KERS
v.
WAUCHOPE.
1812.

Of the same date with that of the trust-deed, the Duke wrote and signed a memorandum relative to the trust-deed, stating, that in case he should be prevented by sudden death from executing a deed of directions to his trustees, he wished them to understand that it was his wish and intention that the disposition and settlement which he had formerly made in favour of his sisters, should stand good so far as regarded them.

In March 1804, the Duke executed a deed of directions to his trustees, by which they were appointed to sell his whole real estate in Scotland, and from the produce thereof and of his personal estate, to make payment of certain legacies and annuities. After payment of the annuities and legacies, the trustees were directed to invest the whole residue of the trust-estate in the public funds, or upon real estate in Scotland, and to pay over the dividends or interest thereof to his sisters, Lady Essex and Lady Mary Ker, and the survivor, and upon the death of the survivor, to pay over the residue to certain persons therein named. This deed of instructions was executed between twelve o'clock of Sunday night the 18th, and one o'clock of Monday morning, the 19th of March, and his Grace expired between ten and eleven o'clock forenoon of the same day.

An action was then brought by Lady Essex and Lady Mary Ker, the sisters and heirs-at-law of his Grace, seeking to have it found that the deed of instructions ought to be reduced on the head of deathbed, in so far at least as it related to heritage, being a deed to their prejudice, who were the natural heirs, and entitled to take up the estate, had their right to the succession not been cut off by that deed.

PLEADED FOR THE HEIRS OF INVESTITURE.—The trust-deed in the present case may be considered in three views. *First*, It was a trust for the Duke's creditors, and for those to whom he had

ARGUMENT FOR
HEIRS OF IN-
VESTITURE.

KERS
v.
WAUCHOP.
1812.

made gifts by *liege poustie* deeds, and so far it must stand good. *Second*, It was a trust for raising money to pay any legacies which the Duke might leave by any subsequent deed or will. A person, however, on deathbed can no more affect the heir, or encroach on his heritable estate by giving legacies, than he can give away the estate itself. A vesting of the estate in trust to satisfy legacies, when the reversion remains to the heir, is a mere device to elude the law of deathbed. *Third*, It was a trust as to the residue for such persons as the Duke might afterwards appoint. This was no other than a trust for the granter himself, and his heirs-at-law, if he did not make a different appointment *in liege poustie*. To carry the matter farther would at once annihilate the law of deathbed.

The defenders insist that there exists a device for eluding the law of deathbed, which had escaped the sagacity of the lawyers of former times, and which it is impossible for the heir, in any manner of way, to get the better of. This is the device of a person *in liege poustie*, executing a disposition of his whole estate to certain persons, for behoof of himself and of his heirs, and for such uses and purposes as he should, by a deed *etiam in lecto*, think proper to appoint. This is the device which has been used in the present case. It is necessary, therefore, to consider the nature and effect of a deed of this kind.

A trust-deed for uses and purposes does not convey to the trustees the succession to the estate of the granter. It cannot, therefore, be held as a disposition to a stranger, excluding the heir *alioqui successurus*. It is nothing more than a mere trust for the uses and purposes which are therein mentioned, or which afterwards shall be legally declared, but farther than this, the trustees have no other right or interest in the estate whatever. The real interest in the estate conveyed in every such deed is in fact bestowed upon the granter himself and his heirs. After the granter's death, his heirs, *qua* heirs, have the beneficial interest under the trust, and are entitled to take up whatever parts of the estate may remain after the satisfaction of those uses and purposes which are declared *legitimo tempore et modo*. Where the actual benefit of the truster's succession, being destined to his heirs *alioqui successuri*, remains entire during the whole course of his *liege poustie*, their interest cannot be cut off by a

deed executed by him while *in lecto*. If the estate were even vested in the trustee during the grantor's lifetime, the grantor himself and his heirs would have the *jus crediti* under the trust, or a personal right to the trust-estate, which, like other personal rights to lands, is subjected to and protected by the law of deathbed, as much as a feudal right.

KERR
v.
WAUCHOP.
1812.

It cannot be maintained that the effect of a trust-deed is to alter the nature of the truster's right in his estate altogether, and to enable him to regulate his succession by means which would have been unlawful had no such deed been executed. Such a doctrine is not founded in the law of Scotland. It is settled beyond all controversy, that the truster's right in his estate continues as real after the execution of a deed such as that supposed, as it was before ; and it has been determined, that where heritage is held for behoof of another by the intervention of a trustee, still the right of the person for whose behoof the trust is held, or the *cestui que use*, is a real right, which can only be put past the heir *alioqui successurus* by a deed in *liege poustie*.

In the case of *Willoch v. Auchterlony*, both the disposition and the will were executed *in liege poustie*. The heir *alioqui successurus*, therefore, had nothing to rest upon but the rule, that heritage could not be conveyed in the form of a testament. The trust-deed, he contended, conveyed nothing, and the will alone was the operative instrument. The answer, however, was conclusive, that the trust-deed was a legal and formal conveyance for uses and purposes not declared. The only question therefore was, Whether a will, executed according to the solemnities of the law of England, afforded legal evidence of a mandate or direction to the trustees, with respect to the uses of the trust ? The Court and the House of Lords found, that the will did afford such evidence, and was a sufficient authority to the trustees to transfer the feudal property in which they were vested. It is clear, therefore, that in the decision of the case of *Auchterlony*, the principles of the law of deathbed were in no respect involved, and that it was merely determined by that case, that instructions might be given to trustees in the form of a testamentary deed, instead of that of a deed *inter vivos*.

KERR
v.
WAUGHOP.
1812.
ARGUMENT FOR
TRUSTEE.

PLEADED FOR THE TRUSTEE.—The effect of the conveyance executed by the Duke of Roxburgh *in liege poustie*, in 1803, was to divest his Grace of his unentailed landed estate in Scotland, or at least to give the trustees a personal right over it, which they might render real by infestment. Nothing more was reserved to the Duke than a right of calling the trustees to account for the price. The right, therefore, which remained in the Duke to be conveyed to others, either in the way of inheritance, or by an express deed, was not a right over the estate itself, but a right of calling the trustees to account for the price.

This was the nature of the right acquired by the pursuers by the deed now under reduction. It was a personal right in them, which might be attached by arrestment, and which might be conveyed by testament. In the same way, if the Duke of Roxburgh had not given directions to his trustees as to the application of the whole of the price or produce of his property, but had left a certain part of the price or produce undisposed of, that of course would have belonged to his heirs-at-law. Still the trustees might have sold the whole estate, of which the Duke had denuded himself in their favour, and which they were expressly empowered to dispose of : and they would have only been accountable to the heirs-at-law for the surplus of the price, after paying the debts, legacies, and donations left by his Grace.

The accepting trustee, appointed by the deed of 1803, was completely vested in the property by that deed, and by the infestment which followed upon it. The trust-deed and infestment form, at this hour, the radical right to the unentailed heritage left by the Duke of Roxburgh. With that deed, every person must connect, and from it every person must derive advantage who lays claim to the succession, or any part of it. The trust-deed is not liable to reduction on the head of deathbed. Neither has it been alleged by the pursuers, that it is subject to challenge on any other legal ground. It is admitted by them, that the trust-disposition is a valid and subsisting deed. This disposition, with the infestment, have completed the title of the accepting trustee, who is now feudally invested in the property, in virtue of titles to which no objection is stated.

The deed of instructions to the trustees did nothing more than dispose of the price of the heritable subjects and other property, which heritable subjects had been previously disposed by a conveyance denuding the granter, and vesting the right to them in the trustees.

KERR
v.
WAUCHOP.
1812.

The trust-disposition reserved to the Duke in express terms the power of directing his trustees, by any deed executed even on deathbed, as to the disposal of the price or produce of his property invested in them. The trust-disposition thus contains a reservation of power to the Duke to do the very act which the pursuers now challenge. The reservation is a condition of the trust-disposition. The pursuers connect themselves with it and make use of it as their title. They have therefore no right to object to the exercise of those reserved powers which are contained in that deed.

As, therefore, the Duke was denuded of, and the trustees were invested in the real estate, by means of a deed, executed *in liege poustie*, the subsequent instructions to the trustees, as to the disposal of the price or produce of the lands, was not a deed of that nature, which can be struck at by the law of deathbed. The deed of instruction which the pursuers attempt to reduce, was not a conveyance of heritable property to the prejudice of the heir, and, of consequence, it is not subject to reduction on the head of deathbed. There was a valid *liege poustie* deed, which is not challenged, but which excluded the heir, by conveying the lands to the trustees, as effectually as if it had expressly destined these lands to the defenders, or to any other person. This forms one great distinction between the present case and others which have been lately under the consideration of the Court. In the case now under consideration, the right of the heir was cut off by a deed executed *in liege poustie*, which was not revoked, and against which no challenge or objection has been brought.

The Lords "Reduced, decerned, and declared in terms of the pursuers' libel, as far as relates to the whole of the heritable subjects conveyed by the trust-deed, dated the 1st day of November 1803, and descendible to the pursuers *alioqui successuris* under the titles thereof, which stood in the person of John

JUDGMENT.
Jan. 8, 1806.

KERS
v.
WAUCHOPE.
1812.

Duke of Roxburgh, exclusive of the *mortis causa* settlements executed by his Grace, and decern and declare accordingly. But in so far as regards the heritable property by the said trust-deed, and descendible to the Duke's heirs-male by the titles thereof, Remit to the Lord Ordinary to hear parties' procurators, and to proceed otherwise in the cause as to his Lordship may seem proper."

MS. Notes.
Sir Ilay Campbell's Session
Papers.

On the Session Papers in the cause, LORD PRESIDENT CAMPBELL has written,—“Deathbed challenge clearly well founded as to the heritable estate. Heirs *alioqui successuri* were not excluded by the trust-deed, which was *in liege poustie*, but remained in their proper place till the Duke came to be on deathbed. Too late then to execute a deed of any kind to have the effect of displacing them, and introducing other heirs.

“The trust-deed, so far as it goes, neither is nor can be challenged. But the trustees must denude of the heritable estate in favour of the heirs-at-law after executing the other purposes of it, *i.e.*, after paying debts and legacies, and accounting for the whole personal, *i.e.*, moveable estate to the residuary legatees. The heirs-at-law, by calling upon them to denude of heritable estate, are not homologating the deathbed deed, but the reverse. The very ground of their action is, that the last deed can have no effect as to the heritage. The effect of the trust-deed was not to change the state of the heritage, and instantly to convert it into moveable estate. The deed remained in the granter's power, and was to have no effect at all, even as a mandate to sell, till his death, and at that moment the succession to the heritable estate fell by law to the sisters as heirs-at-law. It is said that nothing remained with the Duke or his heirs but a personal right of calling the trustees to account. But this is a mistaken view of the case. The estate itself remained, and was an heritable estate at his death, no matter whether in his own person, or in a trustee for him. The right of the trustee was merely nominal. Truster, by means of trustee, held even the feudal right, *i.e.*, the substantial right of voting.

“Suppose it could with propriety be called a personal estate, it was a personal right to lands, which is heritable. The word personal is too often confounded with moveable. Trustees can-

not now exercise the power of selling, if the heirs-at-law choose rather to have the subject itself in kind.—Cases of Durie, &c. In short, the ulterior destination has now fallen to the ground, and the mandate contained in the trust-deed has so far become ineffectual.

KERR
v.
WAUCHOP.
1812.

“Case of Auchterlony no exception, the last deed having been executed *debito tempore*. Sole question was, Whether it should be rejected merely on account of its form, *i.e.*, because it was in the shape of a latter will, though truly a declaration of purposes. This was what Lord Braxfield alluded to in his Observation, page 35 of the other Memorial. The case of Kyd he thought was different, the will there being a substantive, not a relative deed. Too critical to set aside a relative deed merely on account of form. Duke could not reserve to himself the power of dispensing with deathbed. This the whole cause.”

The defenders having Appealed to the House of Lords, LORD ELDON, Chancellor, presiding, “It was Ordered and Adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed.”

Journals of the
House of Lords,
Feb. 21, 1812.

II.—KER v. KER'S TRUSTEES.

The pursuers having failed to reduce the testament of Lady Essex Ker, on the ground that it was invalid for the purpose of affecting heritable estates in Scotland, they brought another action of reduction, on the ground that it had been executed on deathbed. The fact of its having been executed on deathbed was admitted by the defenders, but they pleaded that the right of the pursuers to state that objection was excluded by the trust-conveyance which had been executed by Lady Essex Ker *in liege poustie*. The trust-deed directed the trustees to sell the lands and heritages conveyed, and the terms founded on were these,—“To pay over the residue and remainder of the said proceeds to and for the use of any person or persons I shall name by any writing under my hand, or for such purposes as I may direct by such writing, *and in default of my making such writing*, or giving directions in writing, then to pay over

Oct. 1, 1831.

NARRATIVE.

See *supra*, p.
404.

KER
v.
KER'S
TRUSTEES.

my said residue to my next of kin, according to the law of England, or Statute of Distributions."

1831.
ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The right of the heir-at-law to maintain his title against every deathbed conveyance is so sacred, that even where he has been actually excluded, and his title for the time extinguished by a *liege poustie* settlement, he may found on the deathbed deed as effectual to revive his own right by putting an end to the claims of those favoured by the first deed, and still reduce the deathbed deed, in so far as it conveys the estate to another. The trust-deed directs the trustees "to pay over the residue and remainder of the said proceeds to and for the use of any person or persons I shall name by any writing under my hand." If the deed had stopped here, it is plain that in the event of the granter dying without executing a writing, the residue must have fallen to the heir-at-law.

The deed then proceeds to say, that "in default of my making such writing, then to pay over the residue to my next of kin, according to the law of England, or Statute of Distributions." This direction did not constitute a direct and immediate bequest in favour of the next of kin. It was a mere conditional and prospective bequest depending upon the condition of the granter dying without executing a writing. The next of kin, therefore, stood in the position of conditional institutes. They were to take only on the supposition of no writing having been executed. As, however, a writing was executed, their right never came into existence.

It is argued, however, that if the writing be set aside, there has been none executed; and, consequently that the bequest in favour of the next of kin must come into existence. But the principle recognised in the cases of *Crawford v. Coutts*, *Batley v. Small*, and *Moir v. Moodie*, here applies. In these cases, it has been decided that the heir-at-law may avail himself of a deed to the effect of vindicating his rights, while he may at the same time set it aside, so far as prejudicial to him. The pursuers, therefore, are entitled to maintain the validity of the deed in question, to the effect of cutting off the right of the next of kin, and they have also a clear interest to set aside the deed on the head of deathbed.

PLEADED FOR THE DEFENDERS.—By the trust-deed, the estates were vested in the trustees, for behoof alternatively of certain parties. *First*, For those named in any writing executed by the granter ; and, *Second*, In the event of no writing, then in favour of the next of kin. This bequest was not of the nature of a conditional grant. It was a bequest to the effect of excluding the heir-at-law, by giving the estate to one or other of two parties—the one to be named, and the other named. The plea of the pursuers is, that the truster did not lawfully exercise the reserved power of naming the grantee. If so, the estate must go to the persons in whose favour the grant was alternatively made, and consequently the interest of the pursuer is excluded.

KER
v.
KER'S
TRUSTEES.
—
1831.
ARGUMENT FOR
DEFENDERS.

LORD NEWTON, Ordinary, Reported the case, and the Court Ordered the following question to be submitted to the other Judges for their opinion :—" It being admitted that the deed under reduction was executed on deathbed : Whether the pursuers are barred from insisting in the action on the ground set forth under the first, second, and third heads of the defences ?"

QUESTION SUB-
MITTED.

The majority of the consulted Judges returned the following Opinion :—" We are of opinion that the pursuers are barred from insisting in the action, on the grounds set forth in the first head of the defences. A great deal of ingenious argument is used in the Cases, as to the precise nature of the right or interest conferred on the next of kin, under the clause in the trust-disposition, which directs the trustees in the disposal of the residue of the succession. It does not appear to us to be of any material importance what name is given to it, as there can be no doubt that the effect of the clause is to create an obligation on the trustees, in default of the disponent's leaving written instructions as to the disposal of the residue, to pay it over to her next of kin by the law of England.

OPINIONS.
Consulted
Judges.

" The only question seems therefore to be,—Would the default, supposing the pursuers were to succeed in reducing the deed of instructions, in so far as regards the Scotch heritage, *ex capite lecti*, have or have not occurred ? and, of course, Would, or would there not, in such an event, exist an obligation on the trustees to make over this part of the residue to the next of kin ? With a view to this question, we do not

KER
v.
KER'S
TRUSTEES.
1831.

think that, in construing the clause in the trust-deed, we are bound to such a strict interpretation of the words, as to exclude all consideration of the intention of the disponent. On the contrary, we conceive this to be a case where intention ought to be the governing rule. Now we think it clear that by the written instructions, in default of which the trustees are to convey to the next of kin, Lady Essex Ker understood such instructions as were to be effectual in authorizing them to make over to the persons there favoured, and that she never could have meant that a deed which was to be ineffectual in accomplishing the only object she could have in executing it, should yet defeat her further declared intention of preferring her next of kin to her heir-at-law. The deed of instructions, it is true, will not be wholly ineffectual, supposing the reduction to be successful ; but we conceive that the disponent's intention, as expressed in the trust-deed, extended equally to every part of the succession, and that her determination to prefer her next of kin could not reasonably be supposed to be altered as to the remainder, though the deed of instructions had embraced only a part of the residue, or she had seen that it could only have a partial effect.

“ It makes no difference, in our opinion, that the power of reducing is a privilege exclusively competent to the heir-at-law ; because, if he does actually exercise his power, the deed of instructions will thereby be rendered just as ineffectual in authorizing the trustees to dispose of the succession of the real estate of the granter, as if it had been void from any other cause, or had never existed ; and the disponent's preference of her next of kin, if intention is to regulate the matter, ought equally to receive effect. But if the consequences of success in the reduction be thus only to give rise to an obligation on the trustees to make over the heritage, or its proceeds, to the next of kin, it appears to us that the action is barred by want of interest.”

OPINIONS.

At the advising of the cause, LORD BALGRAY observed,—“ The case has been extremely well argued ; and, according to the different views which may be taken, it is not surprising that a difference of opinion should have arisen. It humbly appears to me, that the case ought to be decided, partly upon a due consideration of the evident intention of the granter, and partly on

the form and legal tenor of the deeds, according to the principles of the law of Scotland. It occurs to me that the pursuers are barred from insisting in the action by want of interest, and this appears to me to arise on the following grounds :—

KER
v.
KER'S
TRUSTEES.
1881.

“ *First*, The trust-deed executed by Lady Essex Ker *in liege poustie*, in 1819, validly conveyed, according to the forms of the law of Scotland, ‘ all and sundry lands and heritages whatsoever, situated in that part of Great Britain called Scotland,’ to certain trustees, whereby they were primarily and specially directed ‘ to sell and dispose of the said lands and real estates,’ and to apply the proceeds to certain uses and purposes therein mentioned.

“ *Second*, By the said deed so executed, she reserved the power and faculty, ‘ by any writing under her hand,’ to direct her said trustees to pay over the residue or remainder of the proceeds of the said estates ‘ to any person or persons she might name.’

“ *Third*, By the law of Scotland, it was competent to give such direction by any writing legally indicative of her will and intention, although the same, in the circumstances under which she then stood, might not be sufficient *directly* to convey or burden heritage ; and if such will and intention be instructed by a deed *secundum legem loci*, and would thence be held as evidence of such will and intention, the same is to be held as legal evidence by the law of Scotland, according to the authorities referred to by the defenders.

“ *Fourth*, ‘ In default of making such writing, or giving such directions in writing,’ the trustees are directed to pay over the residue to the next of kin, according to the law of England, in preference to the heirs-at-law ; and that writing in question does not appear to me, nor can be construed, to revoke or alter the trust-deed, or the said substitution, whereby, *ex forma* of the deed, the same, by the law of Scotland, remains in full force, and capable of operation when the case emerges ; and which nomination or direction, if the trustees accept, they are bound to support as the intention of the truster.

“ *Fifth*, The writing in question is admitted to have been proved and acted upon in the Courts of England as legal evidence of the will and intention of Lady Essex Ker ; therefore it seems necessarily to follow that the writing in question should

KER
v.
KER'S
TRUSTEES.
1831.

be sustained as a valid direction and intimation to the trustees; and that the pursuers, having thereby no interest, are not entitled to insist in the present reduction, and that the defenders should be assoilzied."

LORD GILLIES observed,—“ In the shape in which this case now comes before us, I do not think it right to encroach at any length upon the time of your Lordships. The question is, in my view of it, a most important one; but it is, in truth, already decided by the opinions which we have now before us. I have read those opinions, especially that of the majority, with the greatest attention and respect; but I cannot concur in it. Nay, I must own that it excites some degree of surprise, and even alarm in my mind, to see those Judges resting their opinion on the supposed intention of the deceased, of which, however, I see no proof, and treating, as a question of pure intention, a challenge brought on the head of deathbed—a law, of which the avowed object is to defeat the express intention of the granter of the deed challenged. In expounding and giving effect to this law, some points have been definitively settled by repeated judgments of this Court and the House of Lords.

“ It is settled that a trust-deed, for ends and purposes to be declared, though sufficient to give validity to any informal deed afterwards granted, yet will not bar a challenge on the head of deathbed, or render effectual against the heir-at-law any subsequent deed made by the granter on deathbed.

“ It is settled that a deed containing a clause of revocation may be effectually revoked by a subsequent deed on deathbed, although that deed be in all other respects ineffectual, so that the heir-at-law may successfully challenge the subsequent deed containing the revocation, on which he founds, as giving him a title to challenge it. All this was clearly settled in the case of *Coutts v. Crawford*, and other subsequent cases,—particularly that of *Moir v. Mudie*, a decision of the greatest importance and to which I shall afterwards advert.

“ Of the two deeds in this case brought under our consideration, the first is a trust-deed duly and regularly executed, and by which the granter, *in liege poustie*, disposes her real estates to trustees, with directions to convey the same to persons to be named by any writing under her hand; and, in default of

such writing, to the nearest of kin. Such writing was afterwards made, being the second deed now brought before us, and the one which is sought to be reduced. This deed was confessedly executed on deathbed ; and if the trust-deed had stopped short without containing this additional provision in favour of the next of kin, it must be admitted that the second deed might have been set aside by the heirs-at-law. But it is said that the heir's right to challenge is barred by the provision to the next of kin, by which the estates would go to them, unless the second deed be effectual in favour of the defenders. It appears to me, however, that this reasoning is neither sound in itself, nor consistent with the decisions which I have before alluded to.

" The intention of the second deed was manifestly twofold. *First*, It was intended to revoke or annul the prior bequest in favour of the next of kin. *Second*, It was intended to convey the estates to the defenders. The intention of the granter, being expressed on deathbed, was yet unquestionably sufficient to accomplish the first, viz., the annihilation of the provision of the next of kin ; but it certainly was not sufficient, according to the law of deathbed in Scotland, to accomplish the second object, viz., the conveyance of the estate to the defenders, in prejudice of the heirs-at-law. To say that this deed cannot be sufficient for the one purpose, without being sufficient for the other also, is to forget the principle on which the cases of Coutts and Moir were decided. In these cases, it was adjudged that the deathbed deed was effectual as a revocation, though ineffectual as a conveyance ; although in both cases, and particularly in that of Moir, it was indisputably clear that the sole purpose of the revocation was to make way for the conveyance which followed and accompanied it.

" I cannot help suspecting, with much deference, that some degree of error or confusion has crept into the reasoning in this case. It is said that the first deed is ineffectual in favour of the next of kin, because it is revoked in so far by the second deed. Again, it is said that the second deed is an effectual conveyance in favour of the defenders. And why ? Why, unless it be so effectual, it would not be sufficient to revoke the prior deed. Now, I own that I do not distinctly comprehend this reasoning. The first deed must be good, unless recalled by the

KER
v.
KER'S
TRUSTEES.
1881.

KER
v.
KER'S
TRUSTEES.
1831.

second ; that is clear enough. But it is not so clear that the second deed must be held to be in all its parts effectual, merely because it would not be sufficient otherwise to revoke or extinguish the first deed. In the view which I take of the case, this difficulty is avoided. The second deed, so far as it revokes or extinguishes the first, is good, because the will of the granter, expressed on deathbed, is sufficient for that purpose. But the second deed, so far as it conveys to the defenders, is not good, because the will of the granter, expressed on deathbed, is not by our law, sufficient for that purpose.

“In one view, no doubt, the intention of the deceased is the great rule in questions of succession. But, in the succession to real estates, by the law of Scotland, *intention*, unless expressed in *liege poustie*, is of no avail. The right of the heir in this country can only be excluded or defeated by intention expressed in *liege poustie*, and known to exist and continue to the last moment of life. It was the intention of the first deed to prefer the next of kin to the heir ; but at the date of the subsequent deed *quomodo constat* that such was the intention of the deceased ? At one period she preferred her next of kin to the heir ; at another period, on deathbed, she preferred the defenders to her next of kin. But, at this last period, there is no legal evidence, nor any evidence, that she preferred the next of kin to the heir ; yet it is upon the hypothesis that such was her intention, that the whole argument of the defenders is built. Were this to be considered as a mere question of intention, I should say, that as there is no evidence that Lady Essex Ker, at the date of the second deed, preferred the next of kin to her heir-at-law, the heir, under such circumstances, must be entitled to reduce, on the head of deathbed, the conveyance in favour of the defenders, contained in the second deed. His right to do so can only be barred by the preferable claim of some third party, and of the existence of such preferable claim there is here no proof.”

LORD PRESIDENT HOPE observed,—“I certainly agree with the opinion of the majority of the Court as to the intention of the granter. Perhaps I might not allow so much weight to the intention alone, if I thought that it was not legally carried into effect ; but I think the intention was validly carried into effect.

In the first place, there is a complete feudal conveyance to the trustees ; therefore there is no want of form here. They are ordered to sell the estate, and they had power to sell it ; and your Lordships know that in the case of Lord Stair the House of Lords laid it down, that what a testator orders his trustees to do, must be held to be done at the time appointed, or, if no time be appointed, it must be held to be done *debito tempore*. Therefore I hold the estate as sold ; and your Lordships know it has been found that an estate left in this way becomes moveable, and that the reversion can only be attached by arrestment, which is the proper diligence against moveables, and not by inhibition. Holding it, therefore, to be moveable, I must consider that it is to be regulated by the destination of the granter. Now, what is that destination, and what are the terms of the deed ?—‘ And in default of my making such writing, or giving directions in writing, then to pay over the said residue to and among my next of kindred, according to the law of England, or Statute of Distributions.’

“ Now Lady Essex has either executed a nomination, or she has not. I know very well that, vulgarly and vernacularly speaking, you may say that a person makes a nomination, although it is not effectual ; but when you come to talk legally, I have no notion that it is a deed at all, unless it can be carried into effect as a deed. If it be not a nomination of heirs to the effect of carrying the estate to those heirs, then the lady has made no nomination at all. Take this case : Suppose I settle my estate upon A. B. and his heirs-male, whom failing, upon a certain series of substitutes, provided A. B. dispoise his estates to the same series of heirs ; but, in default of his doing so, I dispoise my estate to C. D. and such and such substitutes. A. B. has no objection to this arrangement, and accordingly he proceeds to make, what he intends to be, a disposition of his estate to the same heirs ; but he blunders the disposition—he does not make use of proper dispositive words—or it is not tested before witnesses—or it is blundered in some other way, and does not carry the estate to the substitutes I have named—Would you call that a disposition of the estate, and could you call upon me to give my estate to his heirs-male, on the ground that there was no default on his part, because he had made such

KER
v.
KER'S
TRUSTEES.
1831.

KER
v.
KER'S
TRUSTEES.
1831.

an invalid disposition? My answer is, that in law nothing is a deed which is not effectual as a deed, and can be carried into effect as such. This lady may have intended and attempted to make a nomination of heirs; but if it has not the effect of carrying the estate to these heirs, it is not a nomination in the eye of law; and therefore, in the words of the deed, there is a default of such nomination, and the price must go to the next of kin by the law of England, as ordered in case of such default.

"In this view of the case, there is no occasion to consider the effect of intention on the law of deathbed, nor do I view the opinion of the consulted Judges with the same alarm as Lord Gillies, because, although they have laid more stress on intention than I think necessary, they do not rest on intention, independently of the manner in which it has been carried into effect; and it being established law that the interest of the heir-at-law under such a trust-deed as this is nothing but a personal right of action to call on the trustees to account, it follows clearly that the law of deathbed has nothing to do with this case."

JUDGMENT.
March 10, 1830.

The Court "Sustained the defences, and assoilzied the defenders."

Journals of
the House of
Lords.
Oct. 1, 1831.

The pursuers having Appealed to the House of Lords, LORD BROUGHAM, Chancellor, presiding,—“It was Ordered and Adjudged that the Interlocutors complained of be affirmed.”

LORD BROUGHAM observed,—“My Lords, in this case, I stated when it was heard, that I should look into it, and reconsider the authorities to which I had been referred, and should then mention what occurred to me. With reference to the case itself, I must say, which I do without the least intending to impeach the very great learning and ability with which it was argued, that I have seen questions of much more difficulty, and involving property to a much greater amount, disposed of in far less time, and with infinitely less of printed paper than have been consumed upon this. It is truly nothing more than the construction and effect of these few words,—‘and then to pay over the residue and remainder of the said proceeds to and for the use of any person or persons I shall name by any writing under my hand, or for such persons as I may direct by such

writing ; and in default of my making such writing, or giving directions in writing, then to pay over the said residue, to and among my next of kindred, according to the law of England.'

" The question turns simply upon the meaning of the word 'such;' and upon regard being had to those lines I have now read, referring back from 'such writing' to what was the immediate antecedent,—'to pay over the residue and remainder of the said proceeds, to and for the use of any person or persons I shall name, by any writing under my hand, or for such purposes as I may direct by such writing.' Now it is contended on the part of the appellants, that any direction, however inept, however fruitless, however void of all influence whatever, however remote from a writing by which any interest may be pretended or assumed to be given, is a sufficient performance of this condition, to prevent the operation of the words 'and in default;' for that there would be no default if there was any writing at all, even if it was not an appointment, or a direction, which is no less than saying that it would have done, even if there had been a song written.

" My Lords, I am clearly of opinion, that the interlocutor appealed from ought to be affirmed. I do not propose to your Lordships to give costs, and for this reason, that several of the learned Judges entertained a doubt—not as to the language, but whether the intention could prevail in respect of the law of deathbed. But I am clearly of opinion that the interlocutor ought to be affirmed."

KER
v.
KER'S
TRUSTEES.
1831.

Where Lands are conveyed to Trustees for behoof of a party, the Infestment of the Trustees does not exclude the Widow of the party for whose behoof they held the Lands from her right of terce.

ROSE v. FRASER.

THE investiture of the barony of Kilravock was in favour of Jan. 26, 1790.
 HEIRS-MALE. In 1771, Hugh Rose conveyed the *dominium utile* of NARRATIVE.
 the lands to his brother Lewis Rose, and the heirs-male of his

ROSE
v.
FRASER.
1790.

body ; whom failing, to return to himself and his HEIRS AND ASSIGNEES whatsoever. The conveyance was in trust, and made for the purpose of enabling Hugh Rose to create certain freehold qualifications. The superiority of the lands conveyed to Lewis Rose was divided among four disponees in liferent—the fee being taken to Hugh Rose himself, and his HEIRS AND ASSIGNEES whatsoever.

Upon the death of Hugh Rose, his son Hugh expedé a service in his character of HEIR-MALE, and he obtained from the Crown a charter of resignation in favour of himself and the HEIRS-MALE of his body, and the heirs-male of their bodies ; whom failing, in favour of his nearest lawful heir-male and assignees whatsoever.

A reconveyance of the *dominium utile* of the lands was afterwards made by Lewis Rose, in favour of the said Hugh Rose of Kilravock his nephew, and the heirs-male or female of his body ; whom failing, to his other nearest lawful heirs-male or female and assignees whatsoever, but no infeftment followed. On the death of Mr. Rose, his cousin, James Rose, made up titles as heir-male. His sister also, Elizabeth Rose, was served heiress of line to him, and claimed the lands in that character, and instituted a process of reduction of her brother's service, and the titles made up by James Rose. The Court found that the conveyance that had taken place was sufficient to alter the investitures of the estate in favour of heirs-male, and sustained the claim of Elizabeth Rose. This judgment of the Court was afterwards affirmed by the House of Lords.

Mar. 10, 1784.

April 2, 1787.

The effect of this judgment was to reduce the service expedé by Hugh Rose the younger, in the character of heir-male. His widow had been previously served to her terce. On the reduction of her husband's service as heir-male, an action for reducing her service to her terce was instituted against her by Elizabeth Rose.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The infeftment of Mr. Rose, the defender's husband, having been reduced, the defender has no better claim to the terce, than if he had never been infeft. At the death of her husband the estate of Kilravock remained in *hæreditate jacente* of the party last infeft. The terce is exigible

only out of subjects in which a husband is infest. It cannot therefore be legally demanded from the estate of Kilravock.

The infestment of Lewis Rose cannot be substituted in place of an infestment in the person of the defender's husband, and be held as equivalent to it in the present question. If the infestment of Lewis Rose could be considered in that light, the pursuer has taken an erroneous method of making up her titles, by expeding a general service to her brother, and taking an infestment upon the reconveyance to him by Lewis Rose. She ought in that view to have been served heir in special to her brother in the lands in question. Such a mode, however, of making up her title, would not have been sustained. It was impossible for the defender's husband to have been infest in the lands, without a reconveyance from his uncle Lewis Rose. It is impossible therefore to hold that the infestment of Lewis Rose was equivalent to an infestment in the person of the defender's husband.

The plea that Mr. Rose held the substantial right of fee, through the person of Lewis Rose, the trustee, cannot be sustained to the effect of entitling the defender to her terce. The defender overlooks the distinction—that the trust proceeded not from Mr. Rose, but from his father. Although, therefore, the plea might have been good, if the trust had been granted by Mr. Rose himself, it cannot be sustained in the present case, in respect that it was granted by another. Mr. Rose neither appointed the trustee, nor did he ever become vested in the subject of the trust, for the personal reconveyance not completed by infestment could not have that effect. The decision in the case of *Cumming v. King's Advocate*, does not apply; for, although no terce be due to the trustee's widow, it will not follow that the widow of a person from whom the trust did not proceed would be entitled to it.

PLEADED FOR THE DEFENDER.—The titles made up by Mr. Rose were such as were understood to be sufficient for vesting him in the estate. During his lifetime, these titles were never impeached, and were relied upon by all persons, and especially by the defender. It is therefore equitable that any latent imperfection in them, not made known till after his death, should

ROSE
v.
FRASER.
1790.

ARGUMENT FOR
DEFENDER.

ROSE
v.
FRASER.
1790.

not be permitted to disappoint her of her right of terce. Although, therefore, there existed no effectual infeftment in favour of the deceased, the claim of the defender ought to be sustained.

Mr. Rose was, however, validly infeft in the property in question, inasmuch as Lewis Rose, the trustee, was regularly infeft. The infeftment of the trustee was the infeftment of Mr. Rose. The right of the trustee was purely nominal. It was a trust created for no onerous cause, but merely for the purpose of enabling the proprietor to create freehold qualifications upon his estate. The right of a proprietor is not impaired by a feu-right that is merely nominal. His right of property remains complete, except in so far as it is burdened by the mere form of a feu-right, extinguishable at pleasure. The true and substantial right was in Mr. Rose himself, and the defender's claim of terce, in virtue of that substantial right of property in the person of her husband, ought to be sustained. A nominal feu-right, or a trust-right, in which no one but the truster is concerned, must be considered as a right purely for the truster's behoof. It cannot be founded on in opposition to the granter or his interest. The infeftment must be regarded as the infeftment of the truster or granter of the nominal right, and not of the trustee, who has no right or interest to maintain but that of his constituent.

Neither Lewis Rose, nor any person in his right, found upon the nominal feu-right as a restriction of the defender's claim of terce. On the contrary, Lewis Rose was himself denuded of the nominal right by the reconveyance in favour of the defender's husband. That reconveyance effectually put an end to all right in Lewis Rose, and operated as a discharge of his right in favour of his uncle.

JUDGMENT.
Jan. 28, 1790.

The Lord Ordinary Reported the cause, and the Lords thereafter "Repelled the Reasons of Reduction."

OPINIONS.
Faculty Report.

In the Faculty Report it is stated,—“The Court were of opinion, that as the husband himself could not in any event have founded an objection to his wife's legal claim upon the erroneousness of his titles, his representative, the pursuer, was equally precluded from urging that plea. It seemed, likewise, to be in general understood that the reconveyance, though not completed by sasine, was sufficient to transfer to Mr. Rose the

substantial right held by his father, in contradistinction to the nominal title of his trustee."

On the Session Papers in the cause, LORD PRESIDENT CAMPBELL has written,—“ Question about a claim of terce where the fee of an estate was in a trustee. Clearly entitled to her terce of the Nairn lands. As to superiority of Kilravock, it is not a proper subject of terce ; and as to the *dominium utile*, the material question to be considered is, Whether the infeftment in Lewis Rose as trustee is not tantamount to an infeftment in person of truster himself ? Reconveyance to late Hugh Rose in 1785 was virtual acknowledgment of the substantial right in him, and rendered it unnecessary for him either to serve or make up titles by adjudication in implement. Nominal fee in Lewis Rose became from that moment an actual fee in Hugh Rose. Suppose I purchase an estate, and take the rights in name of a trustee for me who is infeft, will not my widow have her terce ? Suppose I grant an heritable bond to a creditor, will it not be good ? A nominal trust-fee ought not to be held as any impediment to the act of the proprietor, or to the title of any person deriving right from him. It cannot be set up in competition, because it is fictitious. If it cannot exclude the party himself, neither can it his widow. If I am infeft in my estate by the intervention of a trustee, may not I pursue a removing ? Case here similar. Reconveyance to Hugh Rose made any other title in his person unnecessary. An heir having different ways of making up titles, may do it in any consistent form.

“ If I am infeft in my estate, and convey to my eldest son with reserved powers of burdening, and my son is infeft, I may grant an heritable bond to a creditor, the fee being substantially in me, though not so *formaliter*. Suppose I convey that same estate to a trustee to hold it as a mere name for my behoof, the substantial fee remains in me, and I may exercise all acts of property whatever relating to it. No occasion to reserve special powers, for by the nature of the transaction, I reserve the whole powers of a proprietor. In that case, there seems to be no doubt that my widow will have her terce. Lord Stair says,—‘ By whatsoever way the husband is *sine fraude* divested, the terce is excluded.’ But in the supposed case he is not

ROSE
v.
FRASER.

1780.

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

ROSE
v.
FRASER.
1790.

truly divested at all. The case of taking the fee originally in name of a trustee, seems to be nearly the same, the fee being substantially in him. Even without any trust, a fee is sometimes held to be in the husband, although it is actually in another, *e.g.*, where, without providing his wife, he disposes to his eldest son. If it is not a trust, it is a fraud."

1. The equitable principle applied in the case of *ROSE v. FRASER*, has been extended to other cases in which the interests of beneficiaries under trusts are involved. Where lands are conveyed to trustees, with instructions to sell the lands, and invest the price in the purchase of other lands to be settled on a certain series of heirs, or where funds are conveyed for that purpose, and a delay has taken place in carrying the instructions of the truster into effect, the subjects conveyed are dealt with as if the directions of the truster had been implemented; and the beneficiary under the trust is held entitled to exercise the same powers as he might have exercised, if the lands had been actually purchased and conveyed to him by the trustees.

2. In the case of *DALRYMPLE v. RANKEN*, Dec. 3, 1836, LORD GILLIES observed,—“It is a principle of equity and common sense in disposing of questions which arise out of trusts, especially between the trustees and the beneficiary under the trust, that when any delay occurs without his fault, in carrying into effect the directions of the truster, still the been-

ficiary must be dealt with as if the trust had been duly implemented. In this case, therefore, I look upon Ranken just as if he was the assignee of the first heir of entail in these estates. He holds an onerous assignation from the party who possesses the substantial right in the rents and administration of the estates.”

3. In the same case, LORD PRESIDENT HOPE observed,—“It was merely as a matter of convenience that the execution of entails of the lands which were bought by the suspenders was allowed to lie over. Had the trust been literally followed out, that would have been done before this time, and Lord Stair would have been infeft as first heir of entail. It is no fault of his Lordship that this has not been done, and I think that in any question with the suspenders, both Lord Stair and his onerous assignee must be dealt with as if the trust had been so far implemented. It would be unjust to Lord Stair if he was not to be held as being in the same situation in which he would have been, if the entail of these lands had been executed, and he was infeft as first heir of entail.”

4. In the case of *TURNBULL v. COWAN*, March 17, 1848, LORD CHANCELLOR COTTENHAM observed,—“According to the rule of equity which applies to Scotland as well as to this country, what the truster has directed to be done at the time of his death must be considered as having been done, and if it is postponed by any accidental circumstances, although it might make a difference to the parties whether the produce of the trust-estate is received in the shape of interest or in the shape of rent, yet their right must be the same. It is not a postponement by the trustees of the execution of the trust that can possibly take the property from one party entitled to it, and give it to other parties not entitled to it. We must therefore suppose that the testator supposed that what he directed to be done would be done.”

5. In the case of *HOUSTON v. NICHOLSON*, January 28, 1756, Lady Shaw entailed her estate of Carnock, and certain annuities, upon her daughter Lady Houston, as institute. The entail contained a clause empowering the institute and the heirs of tailie to provide their respective husbands and wives in a competent liferent “out of the foresaid estate not exceeding a just third of the rents thereof, by way of locality,” which was declared to be in full to them, both of courtesy and terce. By a subsequent clause of the deed, the entailer appointed her daughter to employ the annuities in the purchase of lands, and to annex them to the entailed estate, and she directed her to take

the rights to herself and the heirs of tailie, under the same provisions and conditions as were expressed in regard to the entailed estate. Lady Houston and her eldest son, Sir John, afterwards joined in granting a liferent infeftment of a third of the lands to Sir John’s wife, and became bound to pay her a farther annuity of 1600 merks yearly, and in security of the annuity, Lady Houston assigned a third part of the yearly interest of £2026, being the amount of the annuities conveyed by Lady Shaw, and which were at the time invested on heritable security. On the death of Lady Houston and her son Sir John, a claim was made on the part of his widow for a third part of the yearly interest of the sum of £2026. The heir of entail PLEADED,—That the faculty of burdening with a liferent extended only to the extent of the estate of Carnock. The executor of Sir John PLEADED,—That the power of burdening extended to the annuities also, as they were directed to be invested in the purchase of lands, and the lands settled on the same condition and provision with the estate of Carnock. The Lords Found, “That Lady Houston had power to provide the wife of her son, the apparent heir, in his contract of marriage in a jointure of a third part of the entailed money, and that her representatives were bound to implement that obligation.”

6. In the case of *MACPHERSON v. MACPHERSON*, May 24, 1839, an heir of entail in possession, and who had the beneficial interest in

certain trust funds, directed to be laid out in the purchase of lands, to be also entailed, provided his wife, by an antenuptial contract, in an annuity equal to one-fourth of the rents of the entailed estate, and of the whole other estate and effects then under trust, and bound himself to infest her in liferent in the separate estate so soon as it should be vested in land. During the subsistence of the marriage, a portion of the trust-funds was applied in the purchase of lands, and these lands were entailed; and another portion was applied in the purchase of lands, but which were not entailed prior to the death of the husband. The Court held that his widow was entitled to a liferent annuity equal to one-fourth of the free rents of the whole estate, including that which had been entailed, as well as that which had not been entailed prior to the death of her husband.

7. One of the subjects conveyed to the trustees was an heritable bond for £4600. The trustees were directed to demand payment of the bond, and as soon as an opportunity should occur, to purchase land as near to his entailed estate as could be procured, and to execute an entail of the lands so purchased, upon the heir of entail in possession, under the conditions and limitations contained in the deed of entail formerly executed by the truster. By the former entail, the heirs of entail were empowered to provide their wives and husbands in an annuity not exceeding a fourth part of the free

rents of the estate. The directions to the trustees, with regard to the bond, were fulfilled in the lifetime of the husband. With regard to this portion of the trust subjects, LORD MONCREIFF, in the Note to his Interlocutor, observed,—“When the defender maintains that nothing but an infestment in an heritable estate could vest the powers of providing the annuity here claimed, and tries to illustrate the proposition by common rules applicable to land estates descending by succession on ancient titles, she evidently throws aside the fundamental fact, that there is no ancient title, and that all depends on the will of one man, the immediate author of the grantor of the onerous settlement in question. The question is, What is the true and legal import of the deeds executed by the predecessor of the pursuer's husband, in regard to the matter here in discussion? There is no technicality in it; the deeds being all the deeds of one man, who was completely *rei sui arbiter*. The Lord Ordinary apprehends, that Mr. Macpherson was entitled and empowered to bind himself onerously to provide, and in anticipation of the due execution of the trust, directly to provide to his wife an annuity equal to one-fourth of the rents of the whole estate or effects under trust. The trust was expressly constituted for James Macpherson as the first heir of entail; and as it was quite explicit as to the entail referred to, and the title to be given as soon as land should be acquired, he was entitled to act on the faith

of such a title being vested in him when the trust should be fully executed, and to contract and provide accordingly in the exercise of the power which any entail to be made must confirm, and he having done so, and subsequently become vested in the lands in question, it is the same case as if he had then made the same settlement with express reference to the particular lands. It is a much clearer case in this point than that of *Houston v. Nicholson*, for there the money appointed to be laid out on land to be entailed, had not been laid out in the lifetime of the granter of the provision, and the Lord Ordinary cannot think that in this question it can possibly make any difference that the bond here was vested in trust for the heir's behoof."

At the advising of the cause, LORD JUSTICE-CLERK BOYLE observed,—“I cannot get rid of the force of the case of *Houston*. There the money was not laid out at the time of the marriage-contract, and the provision was to be by way of locality, which is a stronger case. It is essentially necessary to look to the will of 1793, and to the intention of old Mr. Macpherson, with reference to which there is no doubt that the heir of entail had the power to provide an annuity to his widow from the funds then under trust, which were to be afterwards laid out in lands to be entailed; and because the executors living in different quarters, did not sufficiently attend to the exact and speedy ful-

filment of that intention, we are not, therefore, to refuse to give effect to it.” LORD MEADOW-BANK observed,—“I am entirely of the same opinion, and consider the case of *Houston* to be decisive.” LORD MEDWYN observed,—“Looking to old Mr. Macpherson's deeds, and to the circumstances of the case, I can see nothing to distinguish it from the case of *Houston*, which is even a stronger case, and I think Mrs. Macpherson's claim is irresistible.”

The case having been appealed by the defender, the judgment was affirmed. LORD CAMPBELL observed,—“The husband having so bound himself, the only question is,—Had he, or had he not, power so to bind the property to which he refers? As to the original property of James Macpherson, there can be no doubt. And there can be no doubt as to the residue of the property which was directed to be laid out in land, and to be entailed. If that had taken place, then, under the provision of the Statute, he had power to make charge for his widow to the extent of one-fourth of the income of that property. And whether the money was actually invested, or remained in trust to be invested, I apprehend it is quite impossible that the widow, the party to the marriage-settlement, could suffer from the omission or neglect of this party in carrying into effect the trusts of the will.”—*House of Lords' Cases*, August 13, 1846.

A Conveyance of Land to Trustees with unlimited powers of sale, subject to a reconveyance of the reversion to the Truster, does not absolutely divest the Truster, but operates merely as a burden on his radical right of property, and that right is liable to be adjudged by his Creditors.

CAMPBELL v. EDDERLINE.

Jan. 14, 1801.

NARRATIVE.

IN 1794, Mr. Campbell of Edderline, conveyed his estate to trustees for behoof of his creditors. By the trust-deed the lands were conveyed to the trustees, and the survivors or survivor of them, absolutely and irredeemably for behoof of the granter's whole creditors. The trustees were empowered, without the consent either of the granter or his creditors, to sell such parts of them as should be sufficient to pay the whole of the truster's debts. After paying the truster's debts, the trustees were appointed to execute a strict entail of the residue. The trust-deed was farther declared irrevocable until the whole purposes of the trust should be fulfilled.

The trustees were infest upon and acted under the trust-deed. The truster died soon after the date of its execution. Soon after his death, an heritable creditor brought a judicial sale of his estate. After this action had been instituted, several other creditors, disregarding the trust-right, led adjudications against the estate. These adjudications were deduced upon special charges directed against the eldest son and heir of the truster.

The truster was indebted to Captain Campbell of Inverliver, in the sum of £2400. His trustees constituted the debt against the trustees of Mr. Campbell of Edderline, and upon the decree of constitution they obtained a decree of adjudication against Edderline's trustees, adjudging from them the estate of Edderline, in payment of the debt due to their constituent. This last adjudication was without year and day of the other adjudications, which were led against the truster's heir.

In the competition among the creditors on the estate of Edderline, the trustees of Mr. Campbell of Inverliver objected to the adjudications which had been led against the heir of the truster, on the ground that the truster was denuded of the fee and property of the estate, by the infestment on the trust-disposition executed by him.

PLEADED FOR THE OBJECTORS.—Mr. Campbell of Edderline was completely divested of the real right and property of his estate by the trust-right and infeftment. The trust-deed conveys, alienates, and disposes the estate from the granter, and his heirs and successors, in favour of General Campbell, and others, in trust, for certain purposes, heritably and irredeemably. Upon this deed, so conceived, infeftment followed. This is one of the established modes of transferring feudal property *inter vivos*. The will of the proprietor, the disponent, is expressed with every requisite solemnity, and delivery of the subject conveyed is given to the disponent in fee and property though in trust, heritably and irredeemably. If this was not a complete transference of the real right and property of the estate, it is difficult to see how one man can be divested of heritable property, and another man invested with it *inter vivos*.

CAMPBELL
v.
EDDERLINE.
1801.
ARGUMENT FOR
OBJECTORS.

If, indeed, the trust had been created entirely for the granter's own behoof, it might be said that the trustees were only a name for the truster, and that he could not be said to be completely divested. Even this might admit of a doubt, in a case such as the present, where the estate was conveyed and delivered to the trustees for certain uses, with a power of sale, and a declaration that the trust should be irrevocable, until these uses were accomplished. The trustees in such a case have an obvious power over the estate, independently of the will of the truster, or former proprietor. It cannot therefore be said, that the granter is not divested of the real right and property, when, independently of his will or consent, the grantee may alienate and deliver this property to another. Neither can it well be said that this alienation takes place in virtue of the special mandate or power to sell contained in the trust-right; for, if the trust-deed were considered merely as a mandate or commission, it would expire by the death of the granter, but it is not pretended that in this case the trust-right, or the power of the trustees, was at an end by Edderline's death. On the contrary, it is admitted that the trustees might validly sell the estate after, as well as before that event. This appears to demonstrate, that, by the trust-deed and infeftment, the trustees were constituted proprietors, and that it was this right of property which enabled them to sell the estate after the death of the granter. It is no doubt

A Conveyance of Land to Trustees subject to a reconveyance absolutely divest the radical right of property to his Creditors.

Jan. 14, 1801.

NARRATIVE.

IN 1794.

trustees for
were co-
them.
whom
or

became under a personal
and his heirs, but this is all
retained.
even in the case where a trust-
behoof of the grantor himself and
to the present case. For here
not executed for the sole behoof of the
the contrary, by its obvious intention, and even by
it was created for the use and behoof of the
creditors, and in particular for those contained in
which is expressly declared to be a part of the trust-deed.
this trust-right, therefore, which is declared to be irrevoca-
the debts were paid, and on which infestment followed,
was acquired to the creditors, of which they
could not be deprived by any act or deed of the truster, or even
of the trustees. It cannot be said, with any propriety, that a
right thus granted by a debtor to his creditors is for the behoof
of the debtor himself. In order that the debts might be paid,
the trustees are invested with an absolute and irrevocable power
of sale. This absolute and independent power of alienation,
which was confessedly vested in the trustees, is of the very
essence of property. It follows, therefore, that Edderline, the
grantor, who retained no power whatever over the fee and prop-
erty of the estate, must have been completely divested.

In order farther to illustrate this point, it may be supposed
that Edderline, during his own life, and that of the trustees, had
found means to pay his debts, and became desirous to be restored
to the possession and property of his estate. How was this to
be accomplished? Would the feudal right, which was trans-
ferred to and vested in the trustees, instantly revert to Edder-
line, without the interposition of any feudal form or any act of
the trustees? This can scarcely be maintained, for it is incon-
sistent with every feudal idea and principle. If, on the other
hand, it is admitted, that a reconveyance from the trustees
would be necessary to reinvest Edderline, this would necessarily
presuppose that Edderline had been formerly divested.

Again, it may be supposed, that, after the death of Edder-
line, the grantor, his son and heir, upon paying the debts, was
desirous to make up titles to the estate, and possess it as pro-

How could this be accomplished? The common mode by which an heir makes up a title to the feudal estate as ancestor, is by a precept of *clare constat*, or by a special service. But neither of these modes would do in the present case. A precept of *clare constat*, and a special service, both proceed on the assumption, that the ancestor, in whose right the claimant demands an entry, died last vest and seized in the fee and property of the estate. In the present case, however, the son and heir of Edderline could not affirm that his father died last vest in the fee and property, for during his own life he was divested of the feudal right and property by the infeftment in favour of the trustees. A precept of *clare constat*, or a special service in favour of the son of Edderline, would therefore carry nothing, since no feudal property remained in Edderline at the time of his death. If, therefore, a feudal service of the heir of Edderline would have been inept and void, a special charge to him to enter heir to his father would be equally void and ineffectual. This is too clear to be contested; for, if the ancestor, to whom the heir is charged to enter, was denuded before his death, it necessarily follows that the special charge, like a special service in the same circumstances, must be void, and, of course, the adjudications founded upon such charge must be void also. The simple question therefore is, Whether, in the circumstances of this case, a special service of the son of Edderline, as heir to his father, could carry anything? It is submitted that it could not, since the feudal property was transmitted from Edderline during his own life, and vested in other persons by infeftment, proceeding on a deed which Edderline could not recall.

As a still farther illustration of the point under consideration, it may be supposed that, after the execution of the trust-right, and after the infeftment upon it was taken and recorded, Edderline had thought proper to borrow a sum of money, and to grant an heritable bond for it on the estate conveyed to the trustees; would not the infeftment on such heritable bond be void and null, as proceeding *a non habente potestatem*? It is humbly apprehended that it would, and yet it must have been valid and effectual, if the feudal right and property of the estate, instead of being transferred to and vested in the trustees, remained

CAMPBELL
v.
EDDERLINE.
1801.

CAMPBELL
v.
EDDERLINE.
1801.

with Edderline the truster. Again, it may be farther supposed, that, after being infeft, the trustees, who had an irrevocable power of selling the estate, had sold the same for an adequate price to one person, and that Edderline the truster had made a sale of it to another, is it not perfectly clear, that the purchaser from the trustees, infeft with an absolute and irrevocable power of sale, would be preferred to the purchaser from Edderline the truster, who, from the face of the records, was completely denuded? If, in this manner, the purchaser from the trustees would be preferable, it could be upon no other principle than that the fee and property of the estate had been vested in them. It is easy to understand, that notwithstanding the trust-right and infeftment, the truster might have a personal obligation upon the trustees to account, or a personal right to the reversion, if there should be any; but it is difficult to conceive that he could retain a right to sell and deliver the *ipsum corpus* of the estate, when, by the express conception of the trust-deed, he had conveyed this right and power of sale, and delivery of the same *ipsum corpus* to the trustees, who might again sell and deliver it to any purchaser. This, in other words, would be to maintain, that two different persons might be absolute proprietors of the same estate at one and the same time.

It is therefore submitted that Mr. Campbell of Edderline, the truster, was completely denuded of the feudal right and property of the estate, and that the same was vested in the trustees. If this plea be sustained, it follows, *first*, That all the adjudications led by the other creditors are void and null, as having been deduced upon special charges against the son of Edderline to enter heir to his father, who was completely denuded after his death; and, *second*, That the adjudications, led by the objectors, upon decreets of constitution against the trustees, who truly had the estate vested in them, must be valid and effectual.

Interlocutor of
Lord Ordinary.

LORD ESKGROVE, Ordinary, "Found, as to the *first* objection. That the late Dugald Campbell of Edderline was not completely divested of the real right and property of his estate by the trust-right and infeftment thereon, founded on by the objectors: the same having been a trust for the granter's behoof, though it contained a power to the trustees of selling the lands, for the

purpose of paying off the granter's debts, but which power the trustees never exercised, and still stood bound, in the event of a sale, to reconvey or settle the remainder for the behoof of the granter and his heirs, which did not disable his lawful creditors, not acceding to the trust-deed, from doing diligence against himself while he lived, or against his apparent heir after his death, for payment or security of their debts ; and, therefore, Repels the objections to the adjudications led by the other creditors against the son and apparent heir of their debtor, after his decease : Finds, as to the *second* objection, That neither the decree of constitution, obtained in absence, at the objectors' instance, against the said trustees, nor the adjudication following thereon, can afford ground for preferring the objectors to the creditors, who had before obtained adjudications against the heir of the debtor upon special charges against him, the objectors' adjudication against the trustees being in *inhabile* diligence, the trustees not being the real proprietors of the lands adjudged, nor the proper debtors in the debts adjudged for ; And, *tertio*, Finds, That the Act of Sederunt 1794, did not deprive lawful creditors of the power of adjudging their debtors' estate according to the legal rules and forms, even during the dependence of a process of ranking and sale ; or deprive such creditors adjudgers, of their due preferences thereby acquired, but only superseded the necessity of creditors leading adjudications posterior to the decree of sale ; and as in this case the other creditors' adjudications are all prior to any such decreet of sale, as well as prior to any adjudication led by the objectors, they are entitled to be ranked accordingly before the objectors, and therefore also Repels the third objection."

CAMPBELL
v.
EDDERLINE.
1801.

The Objectors having reclaimed, the Court " Adhered."

On the Reclaiming Petition for the Objectors, LORD PRESIDENT CAMPBELL has written,—“ Competition between an adjudication upon a decree against trustees, and an adjudication against heir of truster. First and third findings in Interlocutor clearly right. Point settled in case of Sir Alexander Campbell. But the second finding not so clear, for the adjudication against the trustees may also be good. But probably not within year and day. This point, however, not argued in petition.”

JUDGMENT.
Jan. 14, 1801.
MS. Notes.
Sir Hay
Campbell's
Session Papers.

1. Professor Bell observes,—“Creditors in proceeding with adjudications against the trust-estate, may direct these adjudications against the granter of the trust, or his heirs. In the case of Edderline this point was established. They may also, it has been said, direct those adjudications against the trustee. It was also said in that case by Lord President Campbell, that the adjudication against the trustee was competent, and might have been entitled to rank, *pari passu*, with the other creditors adjudging against the heir; and he observed, that it seemed a defect in the case that this was not argued. I have a note from Mr. Archibald Fletcher, counsel in this case, in these words, written soon after the decision :—‘ The Lord President concurred in the judgment; and yet he thought that the estate might be adjudged from the trustees; and that if the adjudication against them had been within year and day of that against the heir, there would have been *pari passu* preference. This, he justly said, was not argued in the petition; and the reason was, that the fact was against us as to the dates.’ ”—*Bell's Comm.*, vol. ii. p. 496.

2. In the case of DONALDSON v. GRANT, March 11, 1786, it was held, that a trust conveyance for behoof of creditors did not take away the right of voting at the election of a member of Parliament. LORD BRAXFIELD observed,—“The vote is good; my creditor's possession is mine. Such possession is an accountable one.

As long as my estate is not sold, it is my property, and I may, when I please, denude the trustees by paying off the debt. A reverser is entitled to vote during the currency of the legal, because he may redeem when he pleases. The Act of Parliament has provided for this very case, by declaring, that no infestment for relief or payment shall have vote.” LORD ESKGROVE observed,—“The right is in the debtor, although the creditor have power to sell.”—*Hailes' Decisions*, vol. ii. p. 994.

3. In the case of CAMPBELL v. SPIERS, December 14, 1790, a party had conveyed his estate to trustees for payment of his debts, with power to take possession, and sell what portion should be necessary, and ultimately settle the residue on certain heirs of entail. The deed contained procuratory and precept, and the trustees took infestment on the precept, but renounced the procuratory in favour of the apparent heir. The question raised was, Whether the titles so standing in the trustees, after the truster's death, his apparent heir had a right to be enrolled as a voter? The Court did not proceed on the circumstance of the procuratory of resignation having been renounced by the trustees in favour of the apparent heir, but held the objection arising from the trust settlement as without any solid foundation. The Faculty Report states,—“Even although the truster had obtained a Crown charter, this, it was observed, would not have precluded the truster or his heir from the privilege of voting as

a freeholder." The Court, therefore, repelled the objection to the apparent heir being enrolled, and this judgment was afterwards affirmed by the House of Lords, March 5, 1791.

4. On the Session Papers in the case of *CAMPBELL v. SPIERS*, Lord President Campbell has written, "Two objections. First, Title. Second, Valuation. As to first,—No want of possession. It is a lucrative succession, though under entail and trust. Sir Alexander represents his father, and receives from the trustees that portion of the rent which is allowed him. The entail disposes the estate in his favour as institute, and he is apparent heir. The possession of the trustees is his possession. Civil possession sufficient. But the objection is, that his title is defeasible, as the trustees may sell to a purchaser, who may execute the procuratory. The renunciation of little consequence, as it only binds them personally, and not recorded in the Register of Sasines; and even if it were, I doubt if it be a feudal method of securing Sir Alexander in the superiority. But independent of this renunciation, can it be said that he is divested of the right of voting by a settlement in his own favour, or, which is the same thing, trustees for him, the *domi-*

nium directum still remaining in *hereditate* untaken up. The objector must be able to shew, that a trust-conveyance, for the purpose of management, and for the heir's own behoof, *quoad* the reversion, is an alienation from the heir. Sir Alexander is entitled to have a charter upon the procuratory in the entail, or which is the same thing as to third parties to be served upon the former investitures, and so to complete the feudal right in his person, which is not inconsistent with the feudal right being also in the trustees. If Sir Alexander died, would not his wife be entitled to her terce, or to the jointure allowed by the entail, upon his making up such titles? Fraser of Lovat in a similar situation. Suppose the trustees also infeft upon a charter from the Crown, would this entirely denude him of the feudal right to his estate, and his wife to the terce? What if Sir James were living, and he had put his estate under trust in his own life, would this have been a good ground for turning him off the roll? Case of Sir Ludovic Grant very much in point. Infeftment in security until sale actually takes place, which will of course actually denude him. But in meantime, the estate belongs to nobody but him."

An Entail executed by a Party who has granted a Trust-conveyance for behoof of Creditors, containing unlimited powers of sale, is valid in virtue of the radical right of property remaining in the Truster.

M'MILLAN v. CAMPBELL.

June 28, 1882.

NARRATIVE.

IN 1797, Mr. Campbell of Combie conveyed his whole property in trust for behoof of his creditors. The trustee had power to sell the lands without any farther advice or consent of the truster or his creditors, privately or publicly, and on such terms as he might think fit. After payment of the truster's debts, the trustee was directed to pay the residue of the trust-funds to the truster, his heirs or assignees, or to any person to whom the truster might direct the same to be paid by a writing under his hand, at any time in his life, and to convey and re-dispose to him and his foresaids the remainder of the lands, if any part of them should remain unsold.

The trust-deed contained procuratory and precept, and the trustee took infeftment on the precept. A considerable portion of the lands was sold, and in 1808 the trustee reconveyed the unsold lands to the truster, under burden of the remaining debts. This deed was dated March 24, 1808, and contained only a procuratory of resignation *ad remanentiam*. Mr. Campbell thereafter expedite an instrument of resignation, which set forth that it proceeded in virtue of the procuratory contained in a disposition of the lands, "dated 25th March last, executed by Mr. Ferrier in his favour." The words "last" and "executed" were written on an erasure, of which no notice was taken in the instrument of resignation. Mr. Campbell then executed an entail of the lands in favour of himself in liferent, and his eldest son Charles in fee. The entail was recorded in the Register of Tailzies in 1814, and after Mr. Campbell's death, his son made up titles to the lands under the entail.

The son having subsequently contracted debts, the pursuer, being one of his creditors, raised a reduction of the instrument of resignation *ad remanentiam*, expedite on the procuratory contained in the reconveyance granted by Mr. Ferrier, his father's trustee, and also the entail that had followed upon it.

PLEADED FOR THE PURSUER.—By the infestment expedite by his trustee, the father of the defender was divested of the lands in question, except as to a base mid-superiority. The instrument of resignation expedite by the defender's father, in virtue of the procuratory contained in the reconveyance by the trustee, was vitiated by erasures. Mr. Campbell was, therefore, never feudally reinvested in the lands. The feudal right of property remained with the trustee, and is still in his *hæreditas jacens*. As, therefore, the truster was never reinvested with the right of property, no deed granted by him could convey the feudal right to the lands, or serve as a competent warrant for expediting a charter and infestment. The truster could not, therefore, validly execute the entail in question, and consequently the pursuers, as creditors of his son, are entitled to charge him to enter heir in fee-simple, and thereupon to adjudge the lands.

M'MILLAN
v.
CAMPBELL.
1882.
ARGUMENT FOR
PURSUER.

A disposition to a trustee for behoof of creditors, containing unlimited powers of sale, and a disposition which impledges land to an heritable creditor, are essentially different. The first is a disposition in payment,—the second in security. Accordingly, a renunciation by the heritable creditor, or the fact of his recovering payment, operates the extinction of his heritable right. But a disposition in payment, and the infestment of the disponent, have the effect of entirely divesting the disponent, and of vesting the feudal right in the disponent. Neither is a disposition in payment affected by the stipulation that any reversion shall be reconveyed, as that merely creates a contingent *jus crediti* to the disponent. In the case of Edderline the question merely was, Whether an adjudication should be directed against the trustees infest, or against the heir of the truster? The Court there held, that as the *jus crediti* remained in his *hæreditas jacens*, and never was nor could be in the trustees, no adjudication could take it out of them, and that, therefore, an adjudication, unless directed against the heir of the granter, was inept to carry the *jus crediti* or *exigendi*.

PLEADED FOR THE DEFENDER.—The erasures in the instrument of resignation founded on by the pursuers are unimportant, as the dates therein mentioned were only requisite to identify the procuratory of resignation. This, however, was

ARGUMENT FOR
DEFENDER.

McMILLAN
v.
CAMPBELL.
1832.

sufficiently done by the names of the parties and of the lands, and by a reference to the previous trust-deed. There is no allegation either that any procuratory, except that of March 24, was granted by the trustee.

But farther, it is of no importance whether the procuratory granted by the trustee was previously expedite or not. Notwithstanding the trust-conveyance to Mr. Ferrier, the radical right to the lands remained in the truster, and in virtue of that right he had power to entail the lands. A disposition in trust for behoof of creditors, though containing powers of sale, is essentially different from a disposition and sale of lands. The power of sale is merely granted in explication of the trust, and does not alter the nature of the disposition. There was no intention on the part of the disponent to convey, or of the disponent to accept, the lands in absolute satisfaction of the whole debts, or of any definite part of them. On the contrary, the lands were merely placed under the control of the trustees for the immediate security and the ultimate payment of the creditors. Though different in form, it is substantially the same as a disposition in security, with a power of sale. The question, however, is now no longer open for argument, as the point was decided in the case of Edderline in 1801, and that judgment has been acted on ever since.

Note of Lord
Ordinary.

LORD MONCREIFF, Ordinary, Reported the case to the Court. In a Note, he observed,—“ The Lord Ordinary is inclined to think that the objection stated against the validity of the instrument of resignation *ad remanentiam* is a good objection. If the instrument of resignation *ad remanentiam* is held to be invalid, the consequence is, that David Campbell, the maker of the entail, had no feudal title under the disposition in his favour by Mr. Ferrier. His titles then stood thus :—He originally stood fully invested under his original titles to the estate, before he conveyed it to Mr. Ferrier ; he had disposed it to Mr. Ferrier in trust for the payment of his debts, and with a power of sale, under an obligation to reconvey the residue to himself, or his heirs or assignees ; and on this conveyance Mr. Ferrier stood infest. And by Mr. Ferrier's disposition to David Campbell there was a personal right vested in him, with an unexecuted procuratory of resignation. The question between the parties

is, Whether, under any of these titles, David Campbell had power to execute a deed of strict entail in the form of a procuratory of resignation, to the effect that, when the title was completed by charter and sasine, the entail should be effectual against the creditors of his immediate heir ?

M'MILLAN
v.
CAMPBELL.
1832.

“ It is maintained that David Campbell had power to execute the entail, *First*, In virtue of his original radical title, preceding the trust-conveyance to Mr. Ferrier; and, *Second*, In virtue of the personal right which stood in him under Mr. Ferrier's disposition. The first of these points appears to the Lord Ordinary to be the most important; and he thinks that it is ruled by the principle first settled in the case of the creditors of Campbell of Edderline, 14th January 1801. It seems to be impossible to explain away the doctrine of that case in the manner attempted by the pursuers. The facts are simple :—Dugald Campbell stood infeft in the estate;—he conveyed his estate, heritably and irredeemably, to trustees, expressly for payment of his debts, with power to sell, and under an obligation to reconvey any residue under a strict entail. The trustees were infeft. Mr. Campbell died, and a competition arose between adjudgers from the trustees, and prior adjudgers who had proceeded directly against the estate, as in *hæreditate jacente* of him, by charging his heir to enter. There could not be a more perfect state of the case for trying the question, whether the feudal title subsisted in the truster? The creditors who adjudged the *hæreditas jacens*, did not adjudge any mere *jus crediti*;—they adjudged the estate itself by charging the heir to enter, which charge necessarily implied that it was competent for the heir to be served in special as heir of the investiture; and accordingly the interlocutor of Lord Eskgrove, adhered to by the Court, expressly found that Dugald Campbell ‘ was not completely divested of the real right and property of his estate by the trust-right and infeftment thereon founded on by the objectors,—the same having been a trust for the granter's behoof, though it contained a power to the trustees of selling the lands,’ &c.

“ The Lord Ordinary is of opinion, that whenever an estate can be adjudged as in *hæreditate jacente*, to the effect of carrying a feudal title by charter of adjudication, it must be equally competent to the heir to be served and infeft; and he thinks it

McMILLAN
v.
CAMPBELL.
1832.

a self-evident proposition, that whenever a man's title so stands by his investiture, that upon his death his heir might be served, and get a feudal title directly as heir, he himself must be *in titulo*, while alive, to convey the estate, subject to all existing burdens ; because, if his investiture subsist to the effect of the estate being carried by the service of his heir, he must have, by his sasine, the powers of an undivested *fiar* to convey, however he may be restrained by conditions, or affected by burdens.

“The case of *Edderline* settles the point, that a trust-conveyance almost identical with the trust in the present case does not divest the granter of his feudal title, and is only to be considered as a burden on that title. The form of the question in that case appears to have been very favourable for bringing out the point. But it occurred much more lately in a case not adverted to in the papers—the case of *W. Bellenden Ker* against the trustees of *Lady Essex Ker*. *John Duke of Roxburghe* conveyed his whole unentailed estates to trustees for payment of his debts, and then for purposes to be appointed by him. On his death, the trustees were infeft in his estate. The heirs-at-law, *Lady Essex* and *Lady Mary Kers*, challenged the deed by which the residue was settled ; and having succeeded, they obtained a conveyance from the trustees, and completed their title. But afterwards a defect occurred in regard to the transmission of a part of the estate from *Lady Mary* to *Lady Essex*, in consequence of which *Mr. Bellenden Ker* and others, as heirs-at-law, claimed those lands, as not having been so vested in *Lady Essex* as to warrant her conveyance of them. In order to obviate this plea, it was maintained that *Lady Essex* and *Lady Mary Kers*, before getting the title from the trustees, had made up a title by adjudication upon a trust-bond directed against the estate, as *in hæreditate jacente* of *Duke John* himself ; and as *Lady Essex* had a general service to *Lady Mary*, it was maintained that this title by adjudication, which had remained personal, was sufficient to vest a personal right in her, which she could convey. The Court had no doubt that that adjudication by trust-bond was a valid title, clearly assuming that a feudal title remained in *Duke John* and in his *hæreditas*, notwithstanding the trust-deed and the infeftment on it. It was found, indeed, to have been superseded by the complete feudal title established

under the conveyance of the trustee. But there was no doubt entertained that it was a valid form of obtaining a feudal title in the estate, subject to the burden of the trust. In the case of Sir James Ferguson, the conveyance to Lord Hermand was *ex facie* absolute and unconditional.

McMILLAN
v.
CAMPBELL.
1832.

“ The Lord Ordinary therefore thinks the point quite settled ; and as he cannot enter into the idea that these cases suppose merely the competency of adjudging a *jus crediti* or personal claim to be made effectual through the trust, but, on the contrary, thinks that they necessarily import that a direct feudal title might be taken as remaining in the truster, he is of opinion that the plea of the pursuers is thereby met by a conclusive answer.

“ If the Lord Ordinary were to pronounce a judgment, he would adopt nearly the words of the first part of Lord Eskgrove’s judgment in the case of Edderline, and then find that David Campbell, not having been divested by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and effectually made up, and on this ground assolzie the defender.”

The Court Found, “ That David Campbell not having been divested by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up, and therefore assolzied the defenders from the conclusions of this action.”

JUDGMENT.
March 4, 1831.

The pursuers having Appealed to the House of Lords, “ It was Ordered and Adjudged that the Interlocutor, so far as complained of, should be affirmed.”

House of Lords’
Journals.
June 28, 1832.

LORD WYNFORD observed,—“ My Lords, this is an action of reduction and declarator, brought by the creditors of a person of the name of Campbell, to set aside a settlement of an estate which had been made by Campbell the father. The question for your Lordships is, Whether Campbell the father, at the time of making that settlement, had a sufficient legal estate to enable him to make that settlement ? The facts are these :—

M'MILLAN
v.
CAMPBELL.
1832.

Campbell the father conveyed this property by a deed to a person of the name of Ferrier ; and it appears that the object of the conveyance was to make Ferrier a trustee, for the purpose of paying creditors. If any part of the proceeds of the estate remained, he was to pay these proceeds back to Campbell the father, or if any part of the estate remained unsold, he was to reconvey that estate to Campbell the father. A part only of the estate was sold ; the remainder the trustee intended to reconvey. He made a reconveyance, which the Judges in Scotland decided was imperfectly made, and consequently that no estate passed back by that conveyance. The question then is, Whether Campbell the father—the estate having been conveyed, and there being no effectual reconveyance—was disabled from making a settlement of his property ?

“ If this case had occurred in England, undoubtedly Campbell the father would not have had such an estate as would enable him to levy a fine or suffer a recovery, because the legal estate was clearly out of him ; but this is a case depending on Scotch law, and your Lordships, I should humbly hope, would be very careful how you reverse a decision of Scotch Courts, when proceeding either on the practice of pleading, or the practice of conveyancing ; because it is quite impossible that persons in this country can be so conversant with that practice, or those forms of conveyancing, as the Judges of the Court of Session. This is a pure question of Scotch conveyancing ; the only question being, Whether, notwithstanding this conveyance, there was not, according to the understood law of Scotland, a sufficient legal interest remaining in Campbell to enable him to make this settlement ? If he had been living in England, a Court of Equity, though he had made such a conveyance, would have compelled the person in whom the legal estate was, to complete his conveyance ; it would have been imperfect at common law : but there is a great difference in the Courts of Scotland in that respect, for there is in that country but one Court exercising a jurisdiction of law and equity, and that may have led to the difference upon this subject.

“ The Scotch Judges have decided that, notwithstanding this conveyance, as it appeared upon the face of the deed itself, it was a conveyance for the purpose of paying debts. We are not

to hesitate to reverse, if we see that the law clearly requires it ; but we must see that to be perfectly clear before we overturn the judgment of the Court of Session. This judgment appears to me to be consistent with equity, for this reason, that if the interest was not all disposed of, it belonged to Campbell, the original settler ; and those who claim under him have a right to the disposal of it. A trustee holding under such a deed in this country would have been compelled to reconvey. What right, in equity, then, have the creditors of Campbell's son to come and claim ? They can have no right but through the father ; and if the father had made a strict settlement, they ought not to be allowed to defeat that settlement. The settlement was made by the father, not for the benefit of immediate successors, but the benefit of the line of successors.

M'MILLAN
v.
CAMPBELL.
1832.

“ The Scotch Judges have held, that in consequence of the deed to Ferrier the legal estate was out of the father, but that as it was conveyed to Ferrier for a particular purpose, enough of it remained in the father who conveyed, to enable him to make such a settlement as that before your Lordships. I consider this as a perfectly well decided case. In that which is laid down by my Lord Moncreiff, who was the Lord Ordinary in this case in the Court below, I would express my entire concurrence. His Lordship referred to two cases, which I cannot distinguish from the present, in which the same doctrine is asserted ; the one of a settlement by a person of the name of Campbell, a gentleman of the same name with the settler in the present case, who conveyed his estate in nearly the same words, giving a power of sale, for the purpose of the estate being sold for the payment of debts. There was no reconveyance of that estate ; but the Court, about thirty years ago, held that the person originally conveying had still the legal estate in him. This appears to me precisely the same with the present case. The words in which Lord Eskgrove delivered his judgment are certainly very strong. In giving judgment, his Lordship said, ‘ A conveyance such as this does not divest the granter of his feudal title, and is only to be viewed as a burden upon the land ;’ those words are express,—‘ the feudal title remains undisturbed in the settler of the property.’ This cause was decided about thirty years ago, and was never appealed against to this House.

M'MILLAN
v.
CAMPBELL.
1882.

If there was to be no law in Scotland except that settled by appeals to this House, there would be very little law indeed ; but decisions acquiesced in are of great authority, as there is unquestionably a strong disposition on the part of the good lieges of Scotland, where they can find a good reason for appeal, to bring the case under the consideration of this House. It appears to me, therefore, that we must consider the judgment of the Court of Session in this case, so acquiesced in, as founded in law.

“ In a subsequent case, the same question came under the consideration of the Court, in the case of the Duke of Roxburghe, where a conveyance similar to the present was made, and where it was held that the Duke of Roxburghe still remained the legal owner of the estate, and was entitled to make a legal conveyance of that estate as the legal owner. Here are, therefore, two decisions. Is there, then, any decision to oppose these ? If not, then unquestionably the balance of authority which constitutes the rule of the Court in cases of this description being all on one side, your Lordships would be bound to affirm this judgment. The Lord Advocate, who has brought forward all the learning upon it which the books of law afford, has referred to one case,—the case of Sir Adam Fergusson of Kilkerran, who made a new feu of the lands of Drumellan to his brother, Lord Hermand, his heirs and assignees whatsoever, upon which Lord Hermand was infeft. After this, Sir Adam Fergusson conveyed away his property. The question was, Whether he was in a condition to make that conveyance, having previously made a conveyance to Lord Hermand ? The Court of Session were of opinion that he was in no condition to do that, the legal estate having passed to Lord Hermand. But your Lordships will see the distinction between that case and this. In that case there was no object expressed, such as the payment of debts. In the present case, there is the expression of that object, and the object ceases for which it was made ; so that every one would see that it was not conveyed to him absolutely, but for certain purposes. A person claiming an interest, therefore, would be called upon, in the present case, to look and see whether those purposes were answered or not. In the conveyance to Lord Hermand by the brother, there was nothing of the kind. It was a conveyance, probably, for love and affection, and was an absolute convey-

ance ; and after the object for which it was conveyed was accomplished, the estate was reconveyed, but the conveying it back appears to be an acknowledgment that that was a valid conveyance. The deed objected to being a deed executed between the first and the second conveyance, it appears to me it was impossible that that could stand. Lord Hermand had reconveyed it before the death of his brother, and from that moment Sir Adam Fergusson would have been in the legal possession of the estate ; but a reconveyance after a certain deed had been made, could not give validity to that deed ; and there is a manifest difference between these two cases. A person looking at that deed could not possibly have said that a scintilla of interest, either in law or in equity, remained in the legal owner of the estate. This is the only case which has been attempted to be brought to bear upon this case. It appears to me there is a manifest distinction between the two cases ; therefore, upon the weight of authority, as has been already stated by the learned Judges of the Court of Session, it appears to me we are called upon to affirm this interlocutor.

“ I shall therefore humbly advise your Lordships to affirm it, and I should humbly advise your Lordships to affirm it with costs. I never recommend to your Lordships to give what are called vindictive costs ; they should never be given by way of punishment, for that is preventing the party doing that which, by the law of this country, he has a right to do ; but if a person thinks proper to appeal, he ought to do it at his own expense, and not at the expense of the other party ; that is strict justice between man and man. I know it has been usual to mention a particular sum, but I understand from one of your Lordships’ officers, from whom we are in the habit of receiving great assistance, that that practice has been lately departed from in some cases. I very much approve of that departure. I feel that it is desirable, before your Lordships decide what you should give in the shape of costs, that you should be informed what the costs actually amount to. I shall therefore humbly recommend to your Lordships to postpone the consideration of the question of costs, desiring, at the same time, that the agents for the respondent will submit to the officer of the House their bill, that the officer of the House may inform your Lordships on

M'MILLAN
v.
CAMPBELL.
1832.

M'MILLAN
v.
CAMPBELL.
1832.

another day as to the amount. I shall therefore now only humbly move your Lordships, that the judgment of the Court below be affirmed."

1. In the case of *OGILVY v. ERSKINE*, May 26, 1837, a party, in his contract of marriage, bound himself to settle the fee of certain lands in favour of the heir-male of his marriage, whom failing, to the heir-female, the eldest always succeeding without division. The contract contained no disposition of the lands, and no procuratory or precept. On his death in 1766, his son executed a trust-disposition of the lands, with powers of sale, chiefly for the purpose of paying his father's debts, and under an obligation on the trustees to reconvey "to him, his heirs or assignees, after the trust purposes were fulfilled." The trustees, as empowered by the trust-deed, obtained the son served and infeft as heir to his father. They then infeft themselves base upon the precept in the trust-disposition, and possessed the lands for ten years, after which they reconveyed the lands to the son, with a procuratory *ad remanentiam*, for consolidating the right of property with the right of superiority remaining in him. The son died in 1834, without a settlement, and the Court held that as his right under the obligation in the marriage-contract was equally unlimited with his right as heir of his father, under the old investiture of the

lands, his possession under the latter character did not infer the prescription of that obligation, and that the eldest sister's representative had therefore right to the whole lands, to the exclusion of the younger sister.

2. It was PLEADED for the younger sister, that the destination in the marriage contract had been evacuated by the conveyance to the trustees, and by the reconveyance by them to the grantee and his heirs and assignees. It was PLEADED for the representatives of the elder sister, that the temporary existence of the trust-right did not affect the question that the trust-right was granted primarily for the purpose of paying the debts of the father, and was neither intended nor calculated to affect the succession to the lands—that it was a mere temporary burden on the radical right of the truster, and that by the reconveyance to him by the trustees, everything was left in the same position in which it had been before the trust-right had been granted.

3. LORD FULLERTON observed—“The second question, viz. Whether the trust-deed executed by the late Francis Erskine, and the reconveyance to him by the trustees, altered or evacuated the destination contained in the mar-

riage-contract, is perhaps attended with more difficulty. But in regard to it, too, it appears to the Lord Ordinary, that a principle has been fixed in various cases, turning on the effect and operations of trust-deeds, which necessarily leads to the determination of it against the defender. It cannot be maintained that the trust-deed and reconveyance were specially intended to produce an alteration of the destination in the marriage-contract. The trust was merely a trust executed by Francis Erskine, for the administration of his affairs—for accomplishing certain purposes; and containing, indeed, a power of sale which never was exercised; and, finally, binding the trustees to reconvey, in usual form, upon the termination of the trust, to the granter, his heirs and assignees. This deed was followed by a base infetment, and ultimately by a reconveyance and a resignation, *ad remanentiam*, in the hands of the truster as the superior. But it has been fixed by a long train of decisions, that a trust-deed has no such effect—that it leaves the radical right still in the person of the truster, subject only to the burden of the trust-deed, and the purposes therein contained, and it seems to follow from this principle, that the reconveyance by trustees, in such a case, does not operate positively by creating a new title, but merely negatively, by extinguishing the trust, and thus disencumbering the original title existing in the person of the truster. According to this view, the trust-deed in the present case

neither divested Mr. Francis Erskine of his feudal title to the estate as heir of line, nor of his personal right under the marriage-contract. It had the effect of only burdening both, as still remaining in his person. And the reconveyance, and resignation *ad remanentiam*, operated merely in extinguishing that burden on those titles respectively,—and left them precisely as they formerly stood in the truster's person; each affording a title of possession according to the decisions referred to on the first branch of the cause; and the latter, that is, the marriage-contract, coming in operation, when the *jus crediti* created by it came to be separated from the character of heir of line."

4. LORD COREHOUSE observed,—"At one time I thought that there might perhaps have been a distinction, arising out of the trust-conveyance of the estate of Kirkbuddo, which was executed by Colonel Erskine in 1777, with very ample powers to the trustees. But after carefully considering both the terms of the trust-conveyance, and also of the subsequent reconveyance by the trustees in 1787, I am unable to arrive at that conclusion. The trust-disposition by Colonel Erskine was nothing more than a mere burden on the right. The radical right was always in him, the same as ever, and the burden of the trust-right, from its nature, was temporary, and became extinguished. I see nothing to warrant me in holding that the transient subsistence of the trust had the effect of evacuating the destination in the marriage-

contract; and I perceive literally nothing else in the case which can at all take it out of the series of precedents relied on by the pursuer."

5. In the case of *MELVILLE v. PRESTON*, Feb. 8, 1838, it was held, that where lands were conveyed by a trust-disposition, under the burden of an entail to be executed by the truster, but the effect of which was to be suspended during the subsistence of the trust, the trustees might make up a title to the lands, although the entail has been previously feudalized in the person of the institute. LORD MACKENZIE observed,—“I do not think any thing has been done which can exclude them from making up a title to the lands contained in the entails, as well as the rest. Sir Robert Preston contemplated that the conveyance in favour of his trustees should be under the burden of the entails, whether the entails were made by himself or by his trustees. In either case alike, the trustees were to hold the lands, in virtue of the trust-conveyance, subject to the burden of the entails. A trust-disposition is not a conveyance of an estate out and out. And I think this action ought to be sustained, so as to prevent the intention of the entailer from being disappointed, and to secure the valuable interests of the various parties under this settlement.”

6. LORD COREHOUSE observed,—“As to the feudal difficulty pleaded by the defender, it is without foundation. It is true, there cannot be two co-existing and co-ordinate infestments in fee-simple,

in one and the same estate; but nothing is more common than to have an infestment in fee-simple, burdened either with an entail or a trust. The same party often executes a deed of entail, and a trust-deed for carrying the entail into effect; and it is common enough for trustees, who are charged with the execution of an entail, to make the entail and burden their own right with it, although the trust itself may subsist for a considerable term thereafter. These are not cases of two co-ordinate and co-existing infestments in the same fee. In the present case, there is no question whether the execution of the entails had the effect of revoking any part of the trust-deed, because the granter clearly contemplated that both the trust and the entails should subsist together. Lord Gillies has just read the obligation imposed on the heirs of the granter, to make up a title and convey to the trustees. And I do not see how the trustees could go on without making up a title, and taking infestment. The defender has made up a title to the entailed lands, but her right and interest as heir of entail are suspended, excepting only in two particulars, the exercise of the rights of patronage and the entering of vassals. In these circumstances, who is to collect the rents or remove tenants? The trustees are to administer all these rents; and it appears to me to be necessary that the trustees should be infest, in order that they may be enabled duly to proceed in the extrication of the trust which they have undertaken.”

Heritable Securities granted by a party who has previously granted a conveyance of the lands, ex facie absolute, but truly in Trust for his own behoof, and completed in the person of the Donee, will exclude the personal creditors of the trustor.

GILES v. LINDSAY.

IN 1823, the Marquis of Huntly granted a disposition of cer- Feb. 27, 1844.
tain portions of the lands of Finhaven in favour of David Brown, who was infeft on the precept contained in the disposition. The conveyance, although *ex facie* absolute, was a conveyance in trust, having been granted for political purposes. No deed of reconveyance was executed by Brown in favour of the Marquis, but the Marquis continued to possess the lands in the same manner as he had done before granting the disposition in Brown's favour, and no act of ownership in reference to the lands was ever exercised on the part of Brown. NARRATIVE.

After infeftment had followed on the disposition in Brown's favour, the Marquis granted a bond and disposition in security to the pursuer over the same lands, in security of a loan of £10,000, and upon this disposition the pursuer was infeft. The deed in the pursuer's favour disposed the lands in security, together with all right, title, and interest which the Marquis could in any way claim or pretend thereto. It also contained an assignation of all the writs, evidents, rights, titles, and securities of and concerning the lands, and all actions and executions competent thereupon, with full power to the pursuer to procure himself infeft in the lands, and to do every thing thereanent that the Marquis might have done before granting the assignation in his favour.

The estates of the Marquis of Huntly were thereafter sequestrated, and the defender was appointed trustee. A competition then ensued between the defender, as representing the general body of creditors, and the pursuer and other heritable creditors, in reference to the lands which had been conveyed to Brown.

Three actions were raised by the pursuer. *First*, A summons of constitution against Christian Brown, the sister of

GILES
v.
LINDSAY.
1844

George Brown, then deceased, concluding that she should complete titles to her brother, and reconvey the lands to the pursuer, as holder of the primary right to demand such reconveyance, the lands having been held by her brother in trust merely for behoof of the Marquis, and the substantial right to them having been conveyed to the pursuer by the bond and disposition in security, granted by the Marquis in his favour. The pursuer also raised, *Second*, A summons of declarator of extinction of trust and adjudication, concluding to have it found, that the trust constituted in Brown was at an end, and that the lands ought to be adjudged in favour of the pursuer, or else in favour of the Marquis, to the effect of validating the disposition in security in Mr. Giles' favour. The pursuer farther raised, *Third*, A summons of reduction, improbation, and declarator against Miss Brown, and Mr. Lindsay, the trustee on the Marquis' sequestrated estate, concluding for reduction of Brown's feu-right, or alternatively, whether reduced or not, for declarator of the preferable right in security held by Mr. Giles over the lands, as Brown's right had become entirely extinguished by the purposes of the trust having been fulfilled.

The defender caused the transference in his favour as trustee to be intimated to Miss Brown, who was residing in Australia; and he also applied to her for a reconveyance of the lands in which her brother had been feudally vested in trust for the Marquis. The intimation took place on April 29, 1840; and in October 16th of the same year, Miss Brown executed a reconveyance in favour of the defender, who took infeftment upon it in April 26, 1841. Miss Brown was thereafter infeft in the lands as heir of her brother, on a precept of *clare constat* granted in her favour by the Marquis of Huntly and the defender as trustee on his estate.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—The title in Brown was of a purely fiduciary nature, as much so as if the deed upon which his real right stood had set forth the trust upon the face of it. The question therefore is, Whether the hands of the Marquis were so tied up by this trust as to incapacitate him from dealing with the lands as the radical owner? Had the deed embodied the purpose for which it was granted, it is clear that the privi-

leges and rights of the real owner could have been competently exercised by the Marquis, notwithstanding the constitution of the trust. The case of Campbell of Edderline's creditors, and the more recent one of M'Millan v. Campbell, put this point beyond dispute. The trust constituted in Brown was merely a burden upon the radical and essential right which remained in the Marquis. He was, therefore, entitled to exercise all the powers of real owner.

GILLES
v.
LANDSAY.
1844.

Every right held by the Marquis in relation to the lands conveyed, was effectually transferred by him to the pursuer. The right, therefore, of requiring Brown to divest himself of the trust constituted in his person was effectually transferred. The pursuer was entitled to call upon Brown's representative to denude of the lands in which he was feudally vested, to the effect of securing himself in repayment of his debt. It is true, there is no express conveyance to the pursuer of the *jus crediti* competent to the Marquis against Brown. There is, however, an express assignation to the pursuer of the Marquis' right and interest in, or in any manner connected with the subjects disposed. This assignation was sufficient to carry the *jus crediti* competent to the Marquis against Brown or his representatives to denude of the land so as to sopite and extinguish the right he held in trust, and the pursuer's infestment upon his heritable bond was equivalent to intimation of this assignation in his favour.

The right possessed by the Marquis was a mere personal right to lands, or, rather, a *jus obligationis* against Brown, in whom alone stood the feudal title. In a question with the Marquis, the subjects of this personal right were indisputably claimable by the pursuer, in consequence of his onerous transaction with the Marquis. The personal creditors of the Marquis cannot, therefore, attach the incorporeal right that was in his person, without being subject to the same burden as the Marquis must have been. The defender must, therefore, take the personal right *tantum et tale*, as it stood in the person of the Marquis, and subject to the latent equities competent to third parties.

The conveyance by Miss Brown in the defender's favour is not entitled to any effect in the present competition, as it was

GILES
v.
LINDSAY.
1844.

granted subsequent to her citation in the action at the pursuer's instance, and even subsequent to these actions being called in Court. The granting of that conveyance was, therefore, *ultra vires* of Miss Brown, and it was incompetent for the defender to make use of or found upon it, as it was obtained by him *pendente processu*.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The infestment in Brown's favour operated as a complete feudal divestiture of the Marquis. There was not even a backbond granted by Brown. The lands might have been attached by Brown's creditors, and in the event of his bankruptcy and sequestration, they must have passed to his trustee. All that the Marquis possessed was a mere *jus crediti*, or personal obligation against Brown to reconvey, and had his bankruptcy occurred, the Marquis must have ranked as a personal creditor for the breach of that obligation. The Marquis, therefore, having no real right in the lands, could grant no such security over them as admitted of being completed by infestment as a feudal right. The bond granted to the pursuer no doubt covered the mid-superiority which remained with the Marquis, but the real right of the *dominium utile* had passed away from him entirely.

The utmost which the Marquis could do was to assign the *jus crediti* which he had against Brown. The assignation, if duly intimated to Brown, might have substituted the assignee in the Marquis' place, so as to rank him a personal creditor of Brown, in the obligation to reconvey. The question therefore is,—Which of the parties in the present competition has obtained the prior and preferable right to the *jus crediti* which was left in the Marquis? The pursuer never intimated to Brown. The only way by which the conveyance of the *jus crediti* could be completed, was by intimation to Brown, by the pursuer, of any assignation which he might be held to have obtained to that *jus crediti*, in virtue of his heritable bond. The transference, again, of that right to the defender, in virtue of his decree of adjudication, being a judicial one, was complete without intimation, but, *ob majorem cautelam*, formal notarial intimation was made to Brown's heir. There is no principle or authority for holding that the pursuer's infestment on his bond operated as an inti-

mation to Brown or his heir. Infestment is not a habile mode of transference or publication as to personal rights. The records were never meant as registers of intimated assignations. The case of *Paul v. Boyd* did not raise the point, for there the granter of the bond was also the debtor in his character of truster. The only other trustee was dead, so that the question, whether there had been intimation to the other trustee did not arise, and was not necessary for the determination of the case. The only point really raised for decision was, Whether there had been intimation to Edward Boyd, who had become sole trustee, and the Court held that the circumstance of his being at once debtor and creditor in the obligation, was equivalent to intimation to him.

GILLES
v.
LENDSEY.
1844.

The conveyance by Brown's heir in favour of the defender, though executed after the pursuer's actions had been raised, was perfectly effectual, because the granter was under a previous obligation to grant the conveyance to the party producing the first completed conveyance from the Marquis. In such a case litigiousity is no bar, the deed was not a voluntary one, but one which the party might have been compelled to grant. The defender, therefore, has obtained the first feudal investiture in the lands. His infestment is the only infestment in them. The intimation of the defender's right to Brown's heir took place on the 29th April 1840. At that time nothing had been done by the pursuer to render the subject litigious, or to prevent Miss Brown from executing a conveyance in favour of the defender, who was the first to intimate to her the transference of the Marquis' right to demand the reconveyance. The reduction improbatum at the instance of the pursuer, was not raised till the 4th May 1840. There was nothing, therefore, to tie up the hands of Brown's heir, or to affect her right to grant a conveyance of the subject which would be effectual to the person first completing a feudal title under it. The pursuer and defender were in the situation of two parties, both holding conveyances of personal rights to heritage belonging to the Marquis. The prior assignation was held by the pursuer, but the party first obtaining infestment in the lands, though second in the order of date as to his conveyance of the personal right, must be preferred. This is the situation of the trustee. He was entitled

GILES
v.
LINDSAY.
1844.

to take sasine on that disposition, and he has done so. There was nothing to bar him from so doing. If Miss Brown had power to grant the disposition, the defender must be preferable, because by no step could the pursuer have prevented him from taking infeftment, and infeftment alone can give the preferable right to the subject.

It is denied that the defender as trustee, can only take up the Marquis' personal rights, subject to the same equities to which the Marquis was liable. If the Marquis had been in possession of a reconveyance from Brown, giving him a personal right to the lands originally disposed, that personal right must have passed to the trustee by the statutory assignation, and the truster would at once have been entitled to take infeftment without being exposed to any claim at the instance of the pursuer. The pursuer's situation cannot be better, because the Marquis had not obtained a reconveyance, but had merely a right to demand one. That personal right equally passes to the truster, and upon the same conditions as the personal right to the lands would have done, had the Marquis been in possession of a reconveyance from Brown.

JUDGMENT.
Feb. 27, 1844.

LORD CUNINGHAME, Ordinary, Reported the case, and the Court pronounced the following interlocutor :—" Find that the Marquis of Huntly having purchased the barony and lands of Finhaven, completed titles to the same by two several infeftments, one holding immediately under the Crown, the other holding under himself, and entered into possession of the same as proprietor thereof : Find that the feu-disposition of date 10th October 1823, and infeftment thereon, of a part of the said barony, to the late David Brown, applied to the *dominium utile* of the lands conveyed, but that the same is proved and admitted to have been a trust-title, granted for a temporary purpose, and for the granter's own behoof, which passed no right of property in the lands to the said David Brown, who never had any possession : Find that the said Marquis remained the true owner of the lands, and continued as such in the public and uninterrupted possession of the same, and of the rents, maills, and duties thereof, and in the exercise of all the powers and rights of the heritable proprietor thereof, in virtue of his original in-

feftment in the lands : Find that the said Marquis was not divested of the real right and property of his estate by the said trust-right and infeftment thereon, and that the heritable securities granted by him in virtue of his original and real right, do constitute valid and effectual rights affecting the said lands, and create real preferences in the persons of the creditors ; and find that no objection thereto can be effectually stated by the trustee on the sequestrated estate of the Marquis, in respect of the said trust-title in the person of the said David Brown : Therefore, in the conjoined actions raised at the instance of the heritable creditors, find, decern, and declare, to the extept and in the terms before mentioned, to the effect of the said creditors being preferred upon the price of the lands in their securities for their debts therein contained, so far as unpaid, in terms of the agreement between them and the trustee on the Marquis of Huntly's estate, of date February 8, 1841, produced in process and set forth in the closed record : And in the suspension and interdict at their instance, suspend the letters simpliciter and decern, but to the effect foresaid only, and without farther affecting the right of property vested in the said trustee under the conveyance from the heir of the said Brown ; and in the actions at the instance of the trustee, sustain the defences of the heritable creditors, and assoilzie them from the conclusions of these actions, and decern : Find the heritable creditors entitled to expenses," &c.

GILES
v.
LINDSAY.
1844.

LORD JUSTICE-CLERK HOPE observed,—“ I have felt deeply the serious responsibility of judgment in these cases, and must therefore explain fully the grounds on which I think an important principle of feudal law ought to be enforced, in circumstances different from the state of the facts in any prior cases. But the unanimity of the Court is a matter of great satisfaction to all of us.

OPINIONS.

“ The ground of challenge is, that the Marquis was feudally and completely divested of his right to the *dominium utile* of the estate of Finhaven, by the titles expedite in the names of Gordon and Brown ; that there remained in him only a *jus crediti*, giving rise to an action against Brown, and, as to part of the lands, against Gordon, and a personal right under the reconveyance from Gordon ; and hence, that he could not validly

GILLES
v.
LINDSAY.
1844.

and effectually grant any heritable right affecting the lands, inasmuch as he was not the feudal proprietor of the estates. In short, that he was divested.

“ This ground of challenge is maintained, not by any one in the right of or contracting onerously with Gordon or Brown, or in virtue of any title or interest *acquired from them* ; but by the trustee for the general creditors of the Marquis himself, who at the very same time, for the interests of these creditors, and in order both to secure the estate, and to complete his title as in right of the Marquis, maintains against Gordon and Brown’s heir successfully, and without, in truth, the shadow of opposition, that the titles in them were only nominal—were really and truly trusts—and that he is entitled to expedite the infestment in the one case on Gordon’s reconveyance, in the other to declare the trust and to adjudge ; and as to Brown, to do the same, or to take infestment on a reconveyance from Brown’s heir : And this—because no right of property has passed by the titles, because they were held as trusts—trusts undoubted, proved, or acknowledged—and *because* the Marquis was, and remained, the rightful and true owner of the estate to all intents and in possession *as such*.

“ Gordon and Brown stand aloof together. They say, we had no interests in these deeds whatever. We exercised no power under these nominal titles. Lord Huntly was and is the true proprietor, and we neither did nor could interfere with him. This is as complete for the one party as for Mr. Lindsay.

“ In support, then, of their heritable securities, the creditors plead, that the radical or real right of property remained in the Marquis, under his original infestment, and that his possession was uninterrupted, and public, and ostensible ; and hence, that on the authority of the principles settled by the series of cases ending in Campbell of Edderline and M’Millan v. Campbell, the Marquis had power validly to grant the securities in question, and that the trustee, claiming the estate only in right of the Marquis himself, cannot dispute their validity.

“ If the trust had been *expressed on the face* of the deeds in favour of Gordon and Brown, it is not disputed by Mr. Lindsay that the securities would have been validly and effectually granted by the Marquis, in respect of the radical right remain-

GILES
v.
LINDSAY.
1844.

ing in his person, and must have affected the lands. But it is contended that the titles in favour of Gordon and Brown, being *ex facie* absolute, although they truly passed no *right of property*, yet formed an insurmountable obstacle to the operations of the principles established by the case of Edderline—that the Marquis was so completely *divested*, that he could not, by any act or deed in the character of proprietor, affect the estate, and that the whole feudal right stood on the face of the records in others, so that he had only a *jus crediti*, or, at the utmost, a personal right, excluding the competency of any heritable security being granted by him. In this plea, the state of the titles, although only nominal, is founded on for the purpose of denying effect to the real and true right of property of the actual owner who is in possession, and of refusing validity to his acts; and this, too, at the suit of a party who can only get the estate in respect that these titles in others were truly only trusts, though nominally absolute; and because the right of property was in the party whose acts, as proprietor, he wishes to set aside.

“The very opposite principle governed the case of Edderline, viz., that of making any feudal difficulties from the trust-title bend to the true right of property in the real owner. And it is plain that, if possible, the same principle ought, in justice, to apply here. It is a principle of common law. It is a principle also of feudal law, which attaches to continued *possession* by the true owner the same importance which the common law does.

“In considering whether there is any solid ground of distinction between the case where the trust is expressed in the deed and where it is equally undoubted and proved, let us see what are the difficulties which did occur in the cases of deeds expressing the trust, but which difficulties the Court held must give way to the actual fact as to the real and true right of property, and to the effect of the original infestment in the person of the party granting the trust-deed, but who remained still the only beneficial owner of the estate. I take the facts of the case of Edderline as in Sir Ilay Campbell’s Session Papers.

“1. There is a feudal conveyance of the fee to trustees—complete, perfect—for all purposes in view: which conveyance feudally enables them to sell and to convey to another, without any

GILES
v.
LINDSAY.
1844.

other act or deed on the part of the granter, in concurrence or ratification of their act. Now, this is a complete test of a feudal conveyance. Did it so convey the right of the granter, that the acts of his disponent, in selling and disposing the lands, do not require any concurring disposition by him, to place another in the full and absolute fee of the estate? This is an undoubted effect of the trust-deed in Edderline. 2. The deed is irrevocable. 3. The deed is for behoof of onerous creditors, named in or acceding to it. 4. As the debts were large, the entire subject was never to be reconveyed. 5. There was a positive direction to dispose of part of the *residue* for younger children. 6. The further direction was to entail the remainder of the estate on the granter, and his eldest son in fee. Hence the original infeftment of the granter of the trust-deed was never to revive, or to take effect at all, in any case which could arise. 7. The trustees alone were in actual possession. 8. The truster was dead; so that there arose the further important consideration, that the right and possession under his infeftment was brought to a close by his death—another party was infeft by a complete conveyance granted by him—whose deeds must have effect on the estate. 9. And lastly, whatever were the rights of the heir, yet he could not, by any act of his own, evacuate the trust-title, or obtain full right, except under an entailed conveyance from the trustees. His debts could not have affected the estate, only the residue, the trustees being in actual possession. Now, these are important, actual, necessary results of a feudal conveyance of the fee, and of a title in the trustees; and yet there, notwithstanding, it was found that, as the true right of property remained in the granter, he was not to be held to be *divested* as if the deed had been an onerous sale, and that the real right remained in him as the true owner under his original infeftment; that, on his death, the proper feudal right was in his *hæreditas jacens*; so that, on a charge to the heir to enter, an adjudication, the proper mode of attaching a real right, was competent and habile.

“Observe the terms of Lord Eskgrove’s interlocutor in this case of Edderline. Observe, that Lord Eskgrove finds that the Court must look to the *real right and property* of the estate, and not merely to the form of the title being a trust, although

the trustees had been long in sole possession : *multo magis*, surely, when the party, in whom is the real and true right of property, has been in uninterrupted possession and public exercise of all his rights as proprietor, notwithstanding the nominal title in another. Then this interlocutor is based on the *actual fact* that the title *was a trust*—not on the technicality that the trust was expressed in the deed itself. I think this most important.

GILES
v.
LINDSAY.
1844.

“ So also in *M'Millan v. Campbell*, Lord Moncreiff held, and the Court adopted the same view, that, in similar circumstances, the granter of the trust-right could validly and effectually execute a deed of entail ‘in virtue,’ I quote the words of Lord Moncreiff, ‘of his original radical title,’ and that being the true proprietor, ‘he was *not divested* of his feudal title’ by the trust-deed. These expressions, in his note, are very important. The judgment of the Court found ‘that David Campbell, not having been *divested* by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up.’

“ Here it is expressly found that the trust-title was not even a *feudal* impediment. This puts the principle in a very important light, when one attends to all the actual results above mentioned, which do follow from that very trust-title.

“ I attach great importance to the actual terms of the interlocutors in the cases of *Edderline* and *M'Millan*. The authority of Lord Eskgrove, as a lawyer of the most acute discrimination and profound legal knowledge, is as high as any in the law of Scotland. The interlocutor is obviously most carefully framed ; and I see, from a note on Sir Ilay Campbell's Session Papers, that he had attended very carefully to the case ; and he writes —‘ The first *finding* clearly right.’ His papers, and the note of his opinion taken by Mr. Archibald Fletcher, and quoted by Mr. Bell in his second volume, shows also, by the remarks made on the second finding, which it is needless to quote, that the terms of the interlocutor had received his particular attention. Now, observe the actual finding is, that the granter of the nominal or trust-title was not *completely divested* of his *real right and property* of his estate ; not completely *divested* is the term deliberately adopted by Lord Eskgrove. This term, in judging of the effect

GILES
v.
LINDSAY.
1844.

which it is said must be given to a nominal title in another, is of the highest importance. It establishes the point, that a true owner is not to be held *divested* of his real right and property, if the title he has granted is a trust, and, still more, if it is truly nominal only, and for his own behoof. The whole plea of Mr. Lindsay is founded on the assumed necessity of looking only to the terms or effect of the title granted by the proprietor, and to the technical and feudal difficulty created thereby in the way of the proprietor exercising any right in virtue of his original title, out of which, it is contended, his own deed has taken all force and competency as a title for affecting the lands. Now, the terms of this interlocutor meet this doctrine in its fundamental assumption in point of feudal law, and settle the point that the trust-title does not pass any right of property to the disponees for their own behoof. The granter was not completely *divested* of his real right. As soon as it is fixed that the effect is not to *divest* feudally the granter of his real right, then the ground of challenge wholly fails; for it is based entirely and solely on the impediment in point of feudal form to the real owner's acts, from the assumption that his conveyance had feudally *divested* him to *all* effects. If the point is not good in point of feudal *form*, then it has no foundation at all. As a conveyance of the lands, through which, without any other deed by the granter, another party might be stated effectually in the full and absolute right of property, it is plain that a deed with the trust *expressed* must raise the very same difficulty which is stated here, for both deeds are equally a conveyance of the fee. In this particular, therefore—the turning-point in the whole discussion—the terms of the very careful interlocutor of Lord Eskgrove are most material, confirmed by the express sanction of Sir Hay Campbell and of the whole Court; and then the same terms are repeated in the case of M'Millan by Lord Moncreiff, confirmed by the Court.

“ Then the interlocutor further says—not divested of his *real right and property* in the estate—words of great significancy and force; for they refer directly to the true and real right of property as giving a principle of judgment paramount to *form*, when the title founded on is only a trust or a nominal title, not adverse in point of right to the radical title.

GILES
v.
LINDSAY.
1844.

“ The principle of these decisions I take to be this, viz., that in feudal questions, as in all others, where there is no competition between onerous rights, acquired from *different* parties, the Court must not look merely to the form of the feudal title, if really nominal, and for behoof of the original and only proprietors, but to the substance and reality of the right of property. The feudal forms of titles are to secure, vouch, and perfect the *right of property in land*. But they ought not to be regarded, when there is no adverse interest, *without reference to the heritable right of property*, of which they are the signs and the documents. They are the *writs* and vouchers of the right, not themselves the real *right*. And when in one person alone is the real right of property—when there is neither competing title nor right adverse to his in any one, it would be denying effect to the reality of the right of property, if the proprietor’s acts were held invalid, in respect of the form of a nominal title, which was held solely for his own behoof, and to which no *right of property* belonged.

“ That is the principle of these decisions—a principle deeply founded in the common law, and equally supported by the true rules of the feudal law, in which the actual and corporal possession of lands by the real owner of the fee, is of the utmost importance—to secure and vouch which, the feudal forms are invented—but against which these forms ought not to be pleaded, when no real interest of any kind exists, or has been acquired under any such forms.

“ Then Lord Moncreiff, in his note on M’Millan, mentions that the point was assumed on all sides in the case of *Bellenden Ker v. Lady Mary Essex*—fully explained in his note. His Lordship and I have both read a very long analysis of that case in the late Lord President’s note-book, and it clearly appears that the Court assumed that the adjudication deduced in that case would have afforded a complete and valid title, if it had not been subsequently abandoned by the parties themselves.

“ In this case, then, *First*, The trust is admitted and substantiated. Hence the titles in the names of Gordon and Brown were wholly nominal, and passed no right whatever. *Second*, The party who was the true owner remained in public and uninterrupted possession as proprietor, in virtue of his original right.

GILES
v.
LINDSAY.
1844.

“ Then, when the only question is, whether his acts affecting the estate are to have effect in a competition between parties, each of whom equally maintain that the titles in Gordon and Brown were only nominal and in trust, can it make a solid substantial ground of difference that the trust is not expressed in these titles ?

“ These titles, if good for anything—if really of any effect whatever in law, would exclude the trustee altogether, and vest the right of property in other parties. But the trustee claims and will get the estates exactly because these titles are only nominal, and because Lord Huntly was the true owner. In a question with him, is it possible for any lawyer to say that a solid and satisfactory distinction could be taken between this case and Edderline, on the ground that the trust was not expressed on the face of the titles in Gordon and Brown, although completely proved by every fact in the case, and acknowledged and admitted by these trustees ? The value of the trust being expressed on the face of the deed, is to supersede other proof. But when the title is *proved*, and *acknowledged* from its date to have been only nominal—to be a trust, and nothing but a trust—that it passed no right of property, and was only a form—is there any solid ground, any legal principle, upon which we can deny effect to the substantial and radical right of the true owner, in virtue of his original title in the *latter* case, after the trust has been so proved, when it is settled that effect must be given as the ruling consideration to the real right of property in the *other* case ? Can it be said that the granter was *divested* of his real right and property in the estate by titles which are trusts, and passed no right of property to the grantees, consistently with the *principle* of the judgment in Edderline ?

“ In some respects this case is more favourable for the application of the principle which governed Edderline ; for, *First*, The *possession* here *remained* with the party in whom was the radical right, whereas, in the other class of cases, the trustees were in many instances in full and complete possession, and in possession too for creditors. *Second*, The trustees in Edderline had onerous purposes to fulfil against the granter, and were not entitled to reconvey till all these purposes were fulfilled. Here, not only are the titles mere trusts, but nominal in every sense

of the term, for there is no trust to be fulfilled, but to reconvey. And, *Third*, The competition in Edderline was between onerous creditors, one set of whom founded on the title in the person of the trustees, and the undoubted and irrevocable conveyance to them, followed with possession ; whereas, here, the very remarkable peculiarity is, that no competing right or interest whatever is founded or granted in virtue of the titles in favour of Gordon and Brown ; Mr. Lindsay, on the contrary, concurring in maintaining that the Marquis, as the true owner, remained in possession all along under his original radical right.

GILES
v.
LINDSAY.
1844.

“ I think we are bound to hold, on the authority of the cases in which the trust was proved, because expressed in the trust-title, that when the trust is, in a manner as satisfactory, *proved* and *acknowledged*, and when the party in whom was the real right and property remained in possession under his radical feudal title, the difficulty created by the nominal title must give way to the paramount principle of the true right of property under the title of the person who granted the nominal and trust-title, and that the true owner, in the words of the judgment in *M'Millan*, was not divested, so that his acts could not affect the estate, in the possession of which he remained as the true owner.

“ On these grounds I am most fully satisfied, that when the title is *proved* to be nominal, passing no right of property, and when no interest whatever has been acquired by any third party, which can be pleaded against the granter, or those acquiring rights from him, and when the granter continued as the true owner in full possession, he is not to be taken in law as completely divested of his real right and property in the estate, and that his onerous deeds must be supported, in respect of his original and radical feudal title, to which title alone any right of property really was attached.

“ I admit the importance of the point involved in this view ; but after very full consideration, I have arrived, without any doubt, at this conclusion.”

LORD MONCREIFF observed,—“ Holding, therefore, that the infestment of Brown did constitute, in point of feudal form, a title in the *dominium utile* of the lands, it is next maintained by the heritable creditors, that that title being merely a trust in

GILES
v.
LINDSAY.
1844.

Brown's person, held for no purpose of benefit to Brown, or any one else, and under an obligation to reconvey to the Marquis whenever he should be required, the substantial right of property still remained in the Marquis in virtue of his own titles, and he was not thereby disabled from creating heritable securities, which must be effectual in any question either with himself or with the trustee for his creditors.

" I regard this as the most important question in the cause ; and, though I do not say that it is perfectly free from difficulty, I have come to an opinion quite satisfactory to my own mind, that the plea of the heritable creditor is solidly founded in the principles of law long recognised.

" Two matters of fact must be kept steadily in view.—That there is no question with Brown's representative, or with any party deriving right from Brown. Much of the argument rests on the circumstance, that the disposition to Brown was in absolute terms. There can be little doubt that this would have been of the greatest importance if Brown had made a conveyance to a third party for onerous causes, or even had become bankrupt while the title stood in that form. There might be considerations requiring attention, even in regard to that case ; but the argument here is not affected by any such difficulty. Brown did nothing, and no one is here deriving any right from him, except by the title of the Marquis himself. The competition is only with the trustee on the Marquis' estate.

" It is equally important to observe, that after granting the disposition to Brown, and after the infestment, the Marquis continued in the undisturbed possession of the whole lands. This is not disputed. I regard it as a fact of the greatest importance, and of importance specially in regard to the only distinction on which the plea of the heritable creditor can be resisted, in consistency with the ruling authorities. From the nature of the transaction it could not be otherwise ; for, on the admitted facts, there never was the slightest intention to convey or transfer any thing to Mr. Brown for his own benefit, or for that of any one else. The case is much stronger in this point than some, or indeed most of the decided cases, in which there were generally ulterior purposes to be accomplished, for which possession had followed, or might have followed. Here no such

thing ever was contemplated, and the Marquis was seen and recognised all the time by the tenants, factors, and all the public, as in the full possession of the lands, just as he had been before. If there could be any doubt of this fact, the very existence of the heritable bonds for these large sums, transacted by able agents, and at the interval of years, would be sufficient to prove it, while there is not an averment nor any insinuation that Brown had any possession at all. Indeed, as your Lordship observed, it does not even appear that the disposition, and the seisin on it, ever were delivered to him, or in his custody. And it is assuredly true, that great effect was given to this consideration in the case of *Lord Elibank v. Campbell*, November 21, 1833.

GILLES
v.
LINDSAY.
1844.

“ Having these points in view, the foundation of the title of both parties is, that the title in Brown was not a real or true right in him, but a title in trust for the Marquis, and for no other purpose ; and this is specially proved by the deed of Miss Brown, prepared and produced by the trustee, which bears expressly that the property remained in the Marquis. It is a declaration of the trust by Brown’s representatives, sanctioned by the trustee, in the sequestration itself. It is impossible to conceive anything stronger. Now, is there any creditor here who can say he transacted on any other footing ? Quite the reverse. No one says he dealt with Brown. Mr. Lindsay says, they all dealt with the Marquis on the footing that Brown’s title was a mere trust, and that the property remained with the Marquis.

“ But it must be observed, that the title in the trust proceeded from the Marquis himself. Whatever right he had was in his own original title, and was not derived from the deed of any other party constituting a trust in his favour. This distinction is pointedly stated by the Lord President, Hope, in *Macdowall v. Russell*, Feb. 6, 1824. His Lordship, in that case, observed, ‘ That there was a material distinction between this case and that where a party having the beneficial interest in the trust was the granter, and the original proprietor ; that the trust was in that case merely a burden on his right ; but where there was no original title, and the right arose from the trust-deed alone, there was only a *jus crediti*. In this opinion the other Judges concurred, and held the case of Gordon’s trustees a precedent

GILES
v.
LENDSEY.
1844.

in point.' In other respects, that case affords no useful illustration in the present case ; but it embodies the positive abstract doctrine, assented to by all the Judges, that where the trust proceeds from the party having the beneficial interest, it is merely a burden on his original right.

" The case of Edderline's creditors is too well known to require particular remark, and, so far as necessary, has been fully explained by your Lordship. It settled a general rule of law ; and it settled it under very strong circumstances, in a competition of creditors, where one party had adjudged from the trustee, and another from the truster, and the latter was preferred ; and that judgment, most carefully laid on the principle by Lord Eskgrove, was felt by Mr. Bell fully to warrant him in embodying the doctrine of it in his work, as a fixed matter of general law.

" The next time that the point arose, was in the competition between Mr. Bellenden Ker, or rather the heirs of line of Lady Mary Ker, against the executors of Lady Essex Ker, in 1823. The plea founded on it failed on other very clear grounds, which it is unnecessary to enter upon ; but no doubt was entertained of the principle, which was thus conceded in the paper of answers for Lady Mary's heirs by Lord Fullerton, alluding to the case of Edderline ;—' It being now quite fixed, that a trust-deed for behoof of creditors does not divest the granter, but merely forms a burden on the fee remaining in his person ; that fee, which fell *in hæreditate jacente* upon the truster's death, was of course taken up (that is, in the case of Edderline) by the adjudication, and upon the special charge.' But, in reality, the trust in the case of Edderline was not merely for payment of debts, but ended in a direction to entail the estate, as in Campbell v. Spiers.

" The last case on the point which has been referred to, is that of M'Millan, 4th March 1831. I was Lord Ordinary in that case, and fully expressed my views regarding it and the general question, in my note annexed to the interlocutor reporting the case to the Court ; and those views having been confirmed by the unanimous judgment of the Court, affirmed by the House of Lords, I have only to say that I still adhere to them.

GILES
v.
LINDSAY.
1844.

“ But it is a most important judgment on the general point. It was a case of trust for the payment of debts, with power to sell, with an obligation to reconvey the residue of the produce to the granter, or his heirs or assignees, and to reconvey what might remain of the estate to any heirs he might name ; whom failing, his heirs or assignees. The trustee was infest, and sold part. He reconveyed the rest, with procuratory of resignation, *ad remanentiam*. The granter expedite an instrument on this ; and after that executed an entail by a procuratory of resignation—the proper form. It was found, however, that the instrument of resignation was bad from erasures. And the question was, whether, notwithstanding this, he was not *in titulo* to make the entail by his original investiture ? It was found that he was, without doubt or difficulty, on the ground that his original title in the lands remained untouched by the trust-deed, against which title adjudication could have been led, and on which his heir could have been served heir in special. It is clear that that was not a trust merely for the payment of debts. By its terms it might have gone much farther, and have become the regulating instrument for the standing investiture of the estate. But still, as a mere trust for the special purposes of the truster, it was held to make no difference on the state of his title, where no question with third parties deriving title from the trustees arose.

“ On these authorities, I think that this case must be decided. The case of trust is admitted, and is palpable on the face of the whole proceedings ; and it is the case on which the plea of Mr. Lindsay himself depends. There is no occasion to prove it, either by the oath of Mr. Brown or by his writ ; and if anything of that kind were necessary, it is proved by the writ of his heir here produced. Then wherein is this case different from any of the cases decided ? It is truly a stronger case than any of them. This is not the case of a trust for creditors, with power to sell ; in which case the lands might depart for ever, or at any rate might be held indefinitely as a separate and independent feudal estate. It is not the case of a trust for debts in the first instance, and an ulterior destination, rendering it certain, if the form only was regarded, that it would never return to the granter. These are strong cases, where infestment has followed,

GILES
v.
LINDSAY.
1844.

for holding that still the radical right remained in the grantor. Yet all have been so decided, and this even in a competition of creditors. The present case seems to be a far simpler and clearer exemplification of the principle, in correct logic and plain justice. The disposition to Mr. Brown never was intended for any purpose but that of a formal title, for the purposes of the grantor. It never produced any thing to create any interest in a third party. It is the bare disposition in trust, which it was at first. Then, how can it be, that a party as trustee on that trustor's estate, founding on that very fact of mere trust as his title, can claim the property, to the exclusion of a party who transacted onerously with the trustor, in the full possession of his property, relying on that very title which remained in his person, and in virtue of which, though under the incorrect denomination of a mere *jus crediti*, the trustee for his creditors now claims it as his ?

"I confess that I cannot see the distinction. I know that there is a great difference between the case of an absolute disposition, and a disposition under reversion or qualification, in any question with a party transacting onerously, and in *bona fide* with the disponent infert. But where there is no such transaction with the disponent, I am unable to see what difference it makes on the question between parties who alike depend on the title of their common debtor, the acknowledged proprietor of the subject, whether the right in him is expressly reserved in the title which it undoubtedly covers, or is necessarily admitted as soon as the subject becomes litigious. I cannot see either truth in the legal deduction, or justice in the application of legal principles, in the distinction so struggled for, which, in the way it is laid down by any authority, has reference to an entirely different state of circumstances. The case of *Fairlie v. Sir J. Fergusson* may seem to present a difficulty ; but it was a very special case, and has been already explained. On all the facts, the title came to depend on Lord Hermand's formal deed of entail ; and that had not been recorded, which was the whole ground of judgment.

"I therefore concur in the opinion delivered on this point ; and as it is sufficient for judgment, it is not very expedient or useful to go deeply into the other questions involved in the case."

A jus crediti to a special heritable subject held by Trustees, vests without service, and is transmissible by assignation.

1.—GORDON'S TRUSTEES *v.* HARPER.

IN 1753, William Tait conveyed by a trust-deed the lands of Craig and Corse to trustees. By this deed he provided the liferent of his estate after his own death to his only daughter Margaret. On the death of his daughter, the trustees were directed to denude themselves of the lands in favour of the heirs of her body, on their attaining majority, and in the event of the daughter dying without issue, they were directed to denude of the lands in favour of such disponees as the truster should appoint, and failing thereof, in favour of his heirs whatsoever.

Dec. 4, 1821.
NARRATIVE.

The daughter died, leaving a son Robert Gordon. When he attained majority, the trustees gave him possession of the lands, but he never made up titles to them. By a deed of settlement, he disposed the lands to trustees, who, after his death, brought a declarator and adjudication against the heirs of William Tait's trustees, who were then all dead. This action sought to have it declared, "That a personal right to the said lands and others, to the effect of obliging the trustees to denude themselves of the trust-estate, and convey the same to the said Robert Gordon, in terms of the said William Tait's trust-settlement, or otherwise to take up the fee and property of the trust-estate by judicial measures, was fully vested in the person of the said Robert Gordon, upon his attaining the years of majority, and was by himself effectually conveyed to trustees by his deed of settlement." This being found, the action sought to have it declared that the lands ought to be adjudged to the pursuers as his trustees. The action was opposed by the heir whatsoever of William Tait, on the ground that as Robert Gordon had never connected himself with the trust-disposition, he had no power to convey the lands in question to the pursuers, and that, therefore, upon his death the succession opened to the defender.

GORDON'S
TRUSTEES
v.
HARPER.

1821.

First Interlocutor of Lord Ordinary.
Feb. 22, 1820.

The first interlocutor pronounced by LORD ALLOWAY, Ordinary, was as follows :—“ The Lord Ordinary having considered the memorials for the parties, and the whole process, finds, That the late William Tait of Lochinkitt, in 1753, conveyed, by a trust-deed, the lands of Craig and Corse, in which he stood feudally invested, to certain trustees therein named ; whom failing, to such persons as they should assume ; whom failing, to such persons as should be named by the Sheriff-depute of Dumfriesshire ; and the trustees being infeft, the truster was completely denuded of these lands : Finds, That the purposes of the trust were to pay over the rents of these lands to Margaret Tait his daughter, spouse of William Gordon, after the truster's death, and after her death these rents were to be employed in the alimenting, clothing, and educating of her children and grandchildren ; and then, in the event of her death, leaving an heir-male or female of her body, the trustees accepting were bound to denude themselves of the said lands to and in favour of such heir-male, upon his attaining the age of twenty-one, or heir-female, upon her majority or marriage ; and that in case of the death of Margaret Tait without heirs of her body, the trustees should be obliged to denude in favour of such disponees as the truster should name by settlement, whom failing, in favour of his heirs whatsoever : Finds, That Robert Gordon, the son of Margaret Tait and William Gordon, attained the age of twenty-one years, and the trustees surrendered the possession of these lands to him, and he remained in possession of the same for many years, until his death in 1818 : Finds, That Robert Gordon, either from the death of the trustees, or from some other cause not explained, had not obtained any conveyance from the trustees, nor had he completed any other title whatever to these lands : Finds, That Robert Gordon executed a trust-deed in favour of the pursuers of this action, and conveyed to them these lands of Craig and Corse, for certain purposes therein mentioned, and who brought the present action for completing a feudal title to these subjects : Finds, That Robert Gordon, as the son of Margaret Tait, upon his attaining majority, was entitled to have brought an action against the trustees, to compel them to yield the possession, and to denude themselves of these subjects in his favour, and that he would have been entitled to complete a

feudal right to the subjects by adjudication, if they had declined so to do, and by which he might have vested a complete feudal title in his person : Finds, That in all these circumstances, the question at issue seems to be, whether Robert Gordon having in him this equitable right of calling upon the trustees to denude, and of vesting in himself a personal or a feudal right to these lands, had acquired such a right as to enable him to transmit the same to his heirs and gratuitous disponees, to the prejudice of the heirs whatsoever of the truster, who upon his failure were substituted to him in the trust-deed : And in respect that this case has not been pleaded at the Bar, appoints counsel to be heard upon this point."

GORDON'S
TRUSTEES
v.
HARPER.
1821.

PLEADED FOR THE PURSUERS.—The trust-deed contains no substitution in favour of the defender, as the heir whatsoever of the truster. It imported merely a conditional institution, which was to take place in the event of the truster's daughter dying without leaving issue of her body. In that case, the trustees were directed to denude in favour of the heirs whatsoever of the truster, failing any appointment by himself. The institution, however, in favour of the heirs whatsoever of the truster, vanished, upon the event of the daughter dying and leaving heirs of her body. The plea of the defender amounts to this—that although all eventual right which the truster chose to provide for him has vanished, he is nevertheless entitled to claim the property as his heir after he had completely denuded himself, and to claim it to the exclusion of the disponees of Robert Gordon, in whose favour he had denuded himself.

ARGUMENT FOR
PURSUERS.

The trustees were under an express obligation to denude in favour of the heir of the truster's daughter. Her heir was thus made creditor in the obligation against the trustees, and had an undoubted right to enforce implement of it. In order to found an action to that effect, he required nothing more than the trust-deed itself, together with a proof of the fact, that he was the heir of the body of the truster's daughter. That fact might have been proved without any necessity of a service. The personal right or ground of action competent to the heir arose out of the trust-deed itself ; and the heir's identity being admitted or proved, his right to insist for implement could not be denied.

GORDON'S
TRUSTEES
v.
HARPER.
1821.

A personal right, or *jus crediti*, requires no service on the part of him for whose behoof it is created. This is true, although the party is not called *nominatim*, but designated only by a general character.

If, again, the heir had this right vested in him *qua* creditor, without service, he was entitled without any service to transmit it to whom he pleased, provided the transmission was made by a formal deed suited to the nature of the subject conveyed. The right vested in the heir was not a real or feudal right to the estate. It was a mere personal right, or *jus ad rem*, constituted by the terms of the trust-deed. This personal right, or *jus ad rem*, was made over by Robert Gordon by his trust-conveyance to the pursuers. The feudal right to the lands was never vested in the pursuers' author. That right was in the trustees of William Tait; and upon their death was in *hereditate jacente* of these trustees. It is in consequence of their death that the present action has been brought, following the form of proceeding established by the Court in the case of *Drummond v. Mackenzie*, June 30, 1758.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The pursuers' author, Mr. Gordon, had not vested in his person such a title to the lands in question, as to enable him effectually to convey them gratuitously to the pursuers, to the prejudice of the defender, who is the heir of the investiture. Mr. Gordon never took any steps to connect himself with the trust-deed of 1753, so as even to acquire a personal right to the lands. The right to the lands was in the trustees, from whom some title was necessary to vest even a personal right to the lands in the person of Mr. Gordon. The mere circumstance of his obtaining possession of the lands cannot aid the plea of the pursuers; for the bare act of possession of heritage confers no title to the lands. The acknowledgment of the trustees that Mr. Gordon was the person entitled to call them to account, cannot, either, confer a title to the estate. A person, as heir-apparent, might have a good title of possession, enabling him to call the trustees to account, but this would never give him power to alter the destination of the estate by a gratuitous deed of settlement.

It is not denied that Mr. Gordon might have completed a

proper title to the lands by declarator and adjudication, accompanied by the proper evidence of his being the heir entitled to the lands. The whole point is, that as Mr. Gordon did not in fact take the necessary steps to complete a title to the lands, the deed granted by him in favour of the pursuers must be held to be ineffectual.

GORDON'S
TRUSTEES
v.
HARPER.
1821.

LORD ALLOWAY, Ordinary, Found,—“ That Robert Gordon, the eldest son of Margaret Tait, had the *jus crediti* under the trust-deed executed by his grandfather William Tait, and had in his person a vested right to compel the trustees to convey to him the lands in question, in terms of the trust-deed by which they held these lands ; and that he could have brought an action against the trustees to compel them to denude in his favour, without any service : Finds, That as Robert Gordon, by his trust-deed in question, has conveyed all the right he had to the lands in question to the pursuers, he has conveyed to them the *jus crediti*, which stood in his person, and which enables them in that character to bring an action against the heirs of the trustees, in the same manner as the deceased himself could have done, to make up titles, and convey the subjects in question ; therefore repels the defences, and decerns in terms of the libel.”

Second Interlocutor of Lord Ordinary.
Jan. 16, 1821.

The defender having reclaimed, the Court “ Adhered.”

“ The Judges were unanimously of opinion, that no service of Robert Gordon was necessary ; that he was a creditor, and that he had effectually conveyed his *jus crediti*.”

JUDGMENT.
Dec. 4, 1821.
OPINIONS.

LORD PRESIDENT HOPE has entered the following note of the case in his note-book :—“ The question was, Whether a *jus crediti* under a trust-deed, could be conveyed without making up a title ; and the circumstances were, that Mr. Tait being feudally vested in the lands of Craig and Corse, conveyed them by a trust-deed to two persons, whom failing, to such trustees as should be named by the Sheriff of Dumfries.

Note of Lord President Hope.

“ Accordingly, the trustees having failed, the parties interested applied to the Sheriff, who named the Sheriff-clerk and another to be trustees. There were various purposes of the trust ; but

GORDON'S
TRUSTEES
v.
HARPER.
1821.

those on which the question turned were, ' 5th, That as soon after the decease of the said Margaret Tait, my daughter, as the heir of her body, if a male, shall arrive at majority, or female at that age, or be married, the trustees shall denude in favour of such heirs. 6th, In case of the decease of my said daughter, without leaving issue descending of her body, the trustees to denude in favour of the granter's heir whatsoever.'

" Margaret Tait, however, left a son, Robert Gordon of Craig, who survived majority, and her, for many years. On his majority, the trustees appointed by the Sheriff appear to have abandoned the subject to him, but he never was infeft, nor did he ever make up a feudal title to the estate. He conveyed, by disposition, all his property, heritable and personal, and especially these lands of Corse and Craig, in trust, for a variety of purposes, in favour of certain trustees, who raised an action of declarator and adjudication, to have it found, *First*, That the right to these lands, under Mr. Tait's trust-deed, was vested in Robert Gordon ; *Secondly*, That heirs not being mentioned, the trust had fallen by the non-acceptance of the trust, and the death of the trustees ; and, *Thirdly*, That the lands should be adjudged to belong to the respondents, as the trust-disponees of Robert Gordon. In this action, the heirs-at-law of Mr. Tait appeared, and pleaded, that as Robert Gordon had never made up any title, he had no power to convey the lands, which therefore remained in *hereditate jacente* of old Tait, and necessarily fell to them as his heirs-at-law. The Lord Ordinary preferred the trustees, in respect that the *jus crediti* under the trust-deed vested in Robert Gordon without a service, and could be validly conveyed by him ; and in this interlocutor I concurred.

" It is quite settled law that such a right, under a trust-deed or marriage-contract, is not a right of succession, but a *jus crediti*, and that it vests and transmits without a service, to the person in the right of it at the time ; and the very case of the mode of taking it up by the person interested, on failure of the trustees, was carefully considered by the Court. in the case of Drummond v. Mackenzie of Redcastle, 30th June 1758, *Kames, Sel. Dec.*, where the Court found, that where the trust-estate was thus left *in medio*, and it was there also heritable, the proper mode of making up a feudal title was, for

the party having the interest under the trust-deed to bring such a declaratory adjudication. As Tait, the original truster, might have brought an action against the trustees to denude, so an assignee from him must have the same right ; and if the trustee be dead, then such adjudication comes in place of it.

GORDON'S
TRUSTEES
v.
HARPER.
1821.

“ The notion that Robert Gordon should have made up a title by service was quite wild. He was the creditor under the trust-deed, and had right to call the trustees to account ; and so it has been found over and over again. And although such a *jus crediti*, as relating to an heritable subject, might descend to the heir, yet it was so far of a moveable nature, and so little the subject of a service, that it was found, that the interest and *jus crediti* of a truster to call the trustees to account for the proceeds of an heritable subject, was attachable by arrestment, and not by inhibition. *Wilson v. Smart*, 31st May 1809. But whether heritable or moveable, *quoad* succession, it is settled law, that it equally vested without a service ; and if it vested without a service, it might be assigned or disposed, as the case might be.”

II.—RUSSELL v. MACDOWALL AND SELKRIG.

In 1788, John Crawford executed a general trust-settlement, *mortis causa*, conveying his whole property to trustees for family purposes. One of the subjects conveyed was a tenement of houses in Glasgow. He appointed that his widow should have the liferent of the houses, and that, on her death, they should go to, and be the absolute property of his eldest son, George Crawford, and the heirs of his body ; whom failing, to the other sons of the truster. The trustees were directed to denude themselves of the said tenement of houses in favour of the sons of the truster, in their order respectively, and to execute all necessary conveyances for that purpose.

Feb. 6, 1823.
NARRATIVE.

In 1793, Mr. Crawford died, and, in order to complete the title of the trustees to the houses, his son, George Crawford, made up titles to them, as heir of his father, and conveyed them

RUSSELL
v.
MACDOWALL &
SELKRIG.
1823.

to the trustees, who were then infest. He thereafter contracted debt to Messrs. Macdowall and Selkrig, and he granted to them, in security, assignations of his share in those parts of the trust-funds which were liferented by his mother, and also of the tenement of houses in Glasgow, with power to bring his father's trustees to account, and to demand and receive from them a valid and sufficient conveyance of the said tenement of houses. The assignations were duly intimated to his father's trustees.

In 1811, the estates of George Crawford were sequestrated; and in 1818, the widow predeceased him. The trustee under the sequestration obtained a special adjudication, on which he made up titles to the tenement of houses in Glasgow. A competition then arose between him and Messrs. Macdowall and Selkrig, claiming under the assignations in their favour.

ARGUMENT FOR
MACDOWALL
AND SELKRIG.

PLEADED FOR MACDOWALL AND SELKRIG.—The question at issue is, Which of the competing parties has the preferable title to a *jus crediti*, which was conferred on the truster's eldest son, George Crawford, in relation to certain heritable subjects in Glasgow?

Mr. Crawford's interest in the subjects in question did consist of a *real* right, for the fee of the subjects was completely vested in his father's trustees. Neither did his interest consist of what is usually denominated a *personal* right to heritage, for no conveyance had been granted in his favour containing a procuratory of resignation and precept of sasine, in virtue of which he could have taken infestment in the subjects. Without obtaining a conveyance, voluntary or judicial, from his father's trustees, it was impossible he could ever be infest in the property.

The true nature of Mr. Crawford's right was, that he was the creditor in the obligation, which was created by his father's trust-deed, and which bound the trustees to convey to him the subjects in question on the death of his mother. Although Mr. Crawford's right related to an heritable subject, yet it was nothing else than a *jus crediti*. The right of every person who is merely the creditor in an obligation, is equally incorporeal, whether the debtor be bound to pay a sum of money, or to convey an heritable subject. The act to be performed by the debtor in the two cases is different, but in both cases the credi-

tor has the same species of right, the right of exacting implement of an obligation.

The right which belonged to Mr. Crawford was in no respect real. There is a wide difference between a *jus dominii*, or even what is usually called a personal right to heritage, and a bare *jus crediti*. The owner of either of the two former rights has extensive powers over the subjects. He can transfer them absolutely to another person, either by granting a procuratory of resignation and precept of sasine, or by assigning the unexecuted procuratory and precept, which may have been granted by a former proprietor.

The person, however, who has a mere *jus crediti* cannot do this. He can transfer to another no right but what belongs to himself. As, therefore, he is only a creditor in an obligation, he can merely substitute another person in his place as creditor. But although a *jus crediti* is thus a right of an inferior description, and vests in the person to whom it belongs much less power than a *jus dominii* does in a proprietor, it is yet a most valuable right; and as it forms part of the fortune of its owner, it must be available to him as a fund of credit.

The real right of a considerable portion of the heritable property in Scotland is vested in persons who have no beneficial interest in the subjects, while those to whom the substantial interest belongs have no title to them, except rights of credit in the nominal fiars. The persons who have the beneficial interest are nothing more than the personal creditors of the persons in whom the fee is vested.

The *jus crediti* which Mr. Crawford had against his father's trustees, was vested in him before he granted the conveyance in question. When that conveyance was granted, the truster had long since been dead, and his son being major, he had a *jus quæsitum* to everything bestowed upon him by the trust-deed. The obligation which was imposed upon the trustees to denude in his favour, was an inherent condition in the trust-right. From the moment the trust became effectual, that obligation was incumbent on the trustees. Mr. Crawford was undoubtedly the creditor in that obligation, and his *jus crediti* was vested and was a subsisting right when he granted the conveyance. It is immaterial that the term at which the obligation was to

RUSSELL
C.
MACDOWALL &
SELKIRG.
1828.

RUSSELL
v.
MACDOWALL &
SELKIRK.
1823.

become exigible, had not yet arrived. A *jus crediti* is as completely vested in the person to whom it belongs before it becomes exigible, as it is after that term. An obligation for payment of a sum of money is in *bonis* of the creditor from the time it is granted, although it should not be payable until some future term, or until the death of a liferenter. In like manner, an obligation *ad factum prestandum* vests in the creditor as soon as it is contracted, although it should not be prestable until a future term, or until the expiry of a liferent.

By the intimated conveyance, the *jus crediti* in Mr. Crawford was effectually conveyed to the authors of the claimants, and they accordingly became the creditors in his place, in the obligation which was incumbent on his father's trustees. The transference of corporeal subjects from one person to another, is completed when they are moveable by delivery, and when they are heritable by actual or symbolical possession. The transference of incorporeal rights, however, is incapable of being completed in either of these ways. The claim which a creditor has upon his debtor, admits of no kind of delivery or of possession, and the only mode in which a conveyance of it can be completed, is by intimation to the debtor. Rights of credit which relate to debts or moveables, can, confessedly, be completed in this way. A person to whom a sum of money is owing, may effectually transfer his *jus crediti* by intimated assignation. In like manner, the purchaser of moveables may, even while they are undelivered, transfer not indeed the right of property in moveables, but his *jus crediti* on the owner of them, and this transference will be completed by an assignation granted by the original purchaser, and intimated to the original seller.

The plea that a transference of a *jus crediti* which relates to heritage cannot be completed in the same manner, and that sasine is necessary to complete the transference of such a right, is unfounded. The plea confounds two things which are perfectly distinct, namely, the corporeal subject to which an obligation relates, and the incorporeal obligation itself. The *jus dominii*, which is a real right, cannot be transmitted from the person in whom it is once vested without a conveyance completed by sasine. The *jus crediti*, however, or the right of claiming such a conveyance being an incorporeal right, and incapable of sasine.

possession, or delivery, is effectually transferred by a formal and intimated conveyance. A creditor's right to demand payment of his money can be effectually assigned, although the money may not be actually paid to the assignee. A purchaser's claim to the delivery of goods he has bought, may be effectually transferred without the assignee obtaining the delivery of the goods themselves. In like manner, a claim upon trustees for a conveyance of heritage, may be effectually transferred before the conveyance itself be actually granted and completed by sasine.

RUSSELL
v.
MACDOWALL &
SELKIRK.
1823.

As, therefore, the *jus crediti* which Mr. Crawford had against his father's trustees was vested in him prior to the conveyance in question, and as that conveyance was completed by intimation to the trustees, the authors of the claimants became the creditors in his place, in the obligation which was incumbent on his father's trustees. The right, therefore, which was thereby conveyed to the authors of the claimants, could not thereafter be defeated by the diligence of Mr. Crawford's creditors.

PLEADED FOR THE TRUSTEE.—The question at issue is, Whether the party having the beneficial interest under a trust such as the one in question, is completely divested of that interest by a personal deed of assignation intimated to the trustees?

ARGUMENT FOR
TRUSTEE.

The nature of the subject in dispute, and the nature of the trust which was constituted in regard to it, are of importance in determining this question. The subject is an heritable estate, feudally vested in trustees, not for behoof of the truster's creditors, for the purpose of being sold for payment of his debts, and the balance paid to himself or his heirs. It is a trust to carry into effect certain family arrangements, giving the trustees no power to sell, and bearing *in gremio* of the conveyance that they held a specific subject for George Crawford and his heirs, whom failing, for his brothers in their order.

The right of the trustees was merely nominal and formal. They were infeft, but not for their own behoof. They possessed none of the powers of proprietors, and had no power to sell. The substantial and beneficial interest in the fee of the subject, was exclusively and indefeasibly vested in George Crawford,

RUSSELL
v.
MACDOWALL &
SELKRIE.
1823.

for whose behoof they were infeft. The question therefore is, Was George Crawford's right of such a nature that he could divest himself of it by a simple assignation? In other words, Was it a right merely personal?

Where trustees are infeft for behoof of a particular individual, without any power on their part, either directly or indirectly, to defeat his right to the specific subject, the right of the beneficiary is not a mere *jus crediti* against the trustees, but a real right in the subject itself. The pursuer's claim is entirely different from that of an individual creditor under a trust constituted for the general behoof of creditors, with a power to the trustees to sell the subject and divide the price. Such trusts are regulated by entirely different principles, and the right of a creditor under them is nothing more than a *jus crediti* against the trustees. In such trusts the real right is exclusively vested in the trustees. The persons for whose behoof the trust is constituted, have no indefeasible right in the specific subject. The express purpose of the trust is the sale of the subject to other persons, and the division of the price among the creditors.

The transmission of a real right requires two things—the consent of the previous owner and an act of delivery by him, and acceptance by the transferee. Possession on the part of the transferee is absolutely necessary, but that possession may either be natural or civil. A proprietor intending to vest a real right in another person, may do so without delivery to the individual himself, provided he make delivery to a third party, who takes possession for that person's behoof. Although delivery be made to the third party, the real right is not vested in him, but in the person who possesses civilly through his intervention.

A land estate may be possessed civilly through the intervention of another. If lands are delivered to A for B, it does not make B's right less real that it was not delivered to him personally, but only through the intervention of A. The real radical and substantial right of property is in B. The right of B, therefore, is not a mere *jus crediti* against A. It is something specifically different, not being a *personal* but a *real* right.

The distinction that exists between trusts of the nature of the one now in question, and trusts for the purposes of sale, and

division of the price among the general creditors of the truster, is apparent. In the former, a real right is vested in the person for whose behoof the trust is constituted. In the latter, the real right is vested in the trustees, each of the creditors having nothing more than a claim for the price, or a *jus crediti* against the trustees. The right of George Crawford was not, therefore, a mere *jus crediti* against his father's trustees, but was in truth a real right in the subject of the trust. Such a right, however, cannot be validly transferred by an intimated assignation.

RUSSELL
v.
MACDOWALL &
SELKRIG.
1823.

LORD MEADOWBANK, Ordinary, reported the case to the Court, and the Court "Preferred Macdowall and Selkrig, and Ordained the trustees to denude in their favour."

JUDGMENT.
Feb. 6, 1823.

"It was observed from the Chair, that there was a material distinction between this case and that where a party having the beneficial interest in the trust was the granter, and the original proprietor—that the trust was in that case merely a burden on his right, but that where there was no original title, and the right arose from the trust-deed alone, there was only a *jus crediti*. In this opinion the rest of the Judges concurred, and held the case of Gordon's Trustees a precedent in point."

OPINIONS.
Shaw & Dunlop,
vol. ii. p. 576.

III.—PAUL v. BOYD'S TRUSTEES.

In 1787, Dr. Boyd executed a settlement of his lands of Culbratton in favour of his eldest son, John; whom failing, his second son, Edward, under reservation of his own liferent. In 1794, he executed a trust-conveyance of the same lands to his wife and his second son, Edward, jointly; and after his wife's decease, to Edward. The purposes of the trust were payment of the truster's debts, and an annuity to his wife, and provisions to his children. On the expiry of the trust, the trustees were directed to denude themselves of the estate, and to renounce the rights standing in their persons in favour of the heirs appointed by the settlement 1787.

May 22, 1835.
NARRATIVE.

PAUL
v.
BOYD'S
TRUSTEES.
1885.

On the death of Dr. Boyd in 1794, his widow and Edward Boyd accepted of the trust, and were infeft. John Boyd, the eldest son, survived his father, but died without making up any title. Edward Boyd expedes a general service to his father, with the view of taking up the open precept in the disposition of 1787, and took infeftment on that precept.

In 1802, Edward Boyd granted a bond and disposition in security to his wife's trustees. By that deed, he bound himself to infeft them in the lands of Culbratton, and he granted a precept for that purpose. He also conveyed to them all right, title, and interest which he had, or could pretend to the lands, and assigned to them the whole writs and evidents concerning the lands, surrogating and substituting the trustees in his full right, under reversion, for their security and payment of the sums of money advanced by them. On this disposition the trustees were infeft.

In 1826, Edward Boyd's estate was sequestrated, and William Paul was appointed trustee, who charged the bankrupt to enter heir in special to his father, and thereupon obtained a decree of adjudication, under which he was infeft in 1830. The trustees of Edward's wife then expedes a service of Edward as heir of provision of his eldest brother John, and they then infeft him under the precept in the disposition of 1787.

The lands of Culbratton having been sold by the trustee under the sequestration, a competition arose regarding the price between him and the trustees of Edward's wife.

ARGUMENT FOR
TRUSTEE UNDER
SEQUESTRATION.

PLEADED BY THE TRUSTEE UNDER THE SEQUESTRATION.—At the time of granting the heritable bond in favour of the trustees of the bankrupt's wife, nothing was intended, except an ordinary heritable security by a feudal proprietor. There was no reference to the existence of the trust, or to any *jus crediti* arising under it. The general terms of conveyance contained in the disposition in security must be read in reference to the context of the deed, and to the nature of the transaction which was truly in the view of the parties at the time the deed was executed. These general terms cannot be held to embrace the *jus crediti* in question, as that was a right of a totally different kind from the right specially conveyed, and was not properly an ac-

cessory of that right. Even if the disposition in security could be held to import an assignation of the *jus crediti*, the assignation was incomplete without intimation ; and no intimation ever followed on it.

PAUL
v.
BOYD'S
TRUSTEES.
1885.

PLEADED FOR MRS. BOYD'S TRUSTEES.—The title made up by the trustee in the sequestration was inept. There was nothing *in hereditate jacente* of Dr. Boyd to be taken up by any heir. He had effectually conveyed his estates to trustees, who were infest accordingly ; and even the reversionary interest under the trust was expressly disposed away. Neither a service to Dr. Boyd, nor the equivalent adopted by Paul, of charging Edward Boyd to enter heir, and then adjudging, could take up any thing whatever.

ARGUMENT FOR
MRS. BOYD'S
TRUSTEES.

The heritable bond in 1802 was an effectual conveyance to the trustees of Edward Boyd's wife of the *jus crediti*, which was then vested in him, under the trust-deed of Dr. Boyd. By it the whole reversionary interest under the trust was then in Edward Boyd. Though the purpose directly in view was merely to constitute a good security over the lands of Culbratton, on the erroneous supposition that Edward Boyd was feudally vested in them, still, as he disposed these lands themselves with their pertinents, and with every right and interest which he had in them, and assigned their whole rents to the creditors, and bound himself in absolute warrandice, this was enough to convey his reversionary interest in these lands, under the subsisting trust which embraced them.

To the effect of securing the loan, this deed was therefore as good as an express conveyance of the *jus crediti* would have been ; and, in a competition of personal rights, which is the utmost that Paul can now contend for, such conveyance was effectual to create a preference. It was sufficiently intimated, seeing that Edward Boyd, who as a trustee was debtor in the *jus crediti*, was the granter of the heritable bond ; and the infestment which passed was sufficient intimation to the widow of Dr. Boyd, the other trustee.

LORD COREHOUSE, Ordinary, " Sustained the claim of the trustees of Mrs. Boyd ; ranked and preferred them upon the

Interlocutor of
Lord Ordinary.

PAUL
v.
BOYD'S
TRUSTEES.
1885.
Note of Lord
Ordinary.

fund *in medio* in terms of their claim, and decerned in the preference accordingly."

In a Note subjoined to his interlocutor, Lord Corehouse observed,—“This case is attended with difficulty, and it is not without hesitation that the Lord Ordinary has preferred the claimants, Messrs. Turnbull and Campbell, as in right of the trustees for Mrs. Boyd. The interlocutor proceeds upon the following grounds :—

“It is admitted that the title of Edward Boyd to the lands of Culbratton, made up by the general service to his father, Dr. Boyd, was inept, and, consequently, that the infeftment of the trustees on the heritable bond by Edward Boyd in their favour was inept also. The Lord Ordinary is clearly of opinion, that the attempt by the trustees to complete the title of Edward Boyd, after his sequestration, was ineffectual. The heritable bond contained no express mandate to infeft him as heir to his brother John, and it cannot be held as an implied mandate to that effect. Again, he had no power after his sequestration to grant such a mandate, as he would thereby have bestowed a preference on the personal creditor, to the prejudice of all the rest.

“On the other hand, it is thought, that Paul, the judicial trustee under Boyd's sequestration, has not completed a valid title to these lands, Dr. Boyd being not only denuded of them for the purposes of the trust, but having conveyed away the reversionary right after the purposes of the trust had been fulfilled.

“The case in this view, resolving into a competition of personal rights, it will be observed, that the heritable bond in favour of Mrs. Boyd's trustees, contains a conveyance, in general terms sufficiently broad, to carry Mr. Boyd's *jus crediti*, or right of reversion, to the estate of Culbratton. It not only binds Edward Boyd to infeft the trustees in the lands, teinds, &c., but procuratory is granted for resigning the lands, teinds, &c., together with all right, title, and interest, which the granter has, or can pretend thereto, or to any part or portion thereof in time coming, in real security and more sure payment of the principal, interest, expenses, and penalties. But, even if this bond were not to be construed as expressly assigning the *jus crediti* of Edward Boyd.

it must be held as an implied assignation to that right, agreeably to the decision in the case of Dewar, March 1686, in which an appriser, uninfert, having infert his wife in an annual-rent of the appraised lands, she was preferred to an adjudger of her husband's right, on the ground that her infertment, though otherwise invalid, was to be held an implied assignation of the apprising. There are other decisions to the same effect.

"It has been objected by the judicial trustee, that, holding the heritable bond, an assignation of the *jus crediti*, it is ineffectual, not being completed by intimation. But the answer appears satisfactory, 1st, That no intimation to Edward Boyd was necessary, as he was not only the granter of the bond, but one of the trustees under his father's trust-disposition, and therefore, not only the cedent, but a debtor in the right assigned. With regard to the other trustee, Mrs. Boyd, the registered infertment upon the bond, as an instrument of possession, may be held equivalent to intimation.

"There is no plea in law in the record, that the heritable bond is to be held an assignation of Edward Boyd's *jus crediti* under the trust; but the facts stated, and deeds referred to, raised that plea, and therefore the Lord Ordinary allowed it to be added."

The Trustee under the sequestration having Reclaimed, the Court "Adhered."

JUDGMENT.
May 22, 1835.

LORD BALGRAY observed,—"It is quite clear that both the heritable titles in the persons of the claimants have been erroneously made up; and the only question is, Whether the general words of conveyance in the heritable bond are sufficient to carry the reversionary interest, which, at the date of it, was vested in the granter, under the trust-deed of 1794? I at first had some doubts upon the point, from the circumstance, that this right was evidently not in the contemplation of the parties at the time. But looking to the broad and general terms of the conveyance, whereby all right, title, or interest which the granter had in the lands were expressly assigned, and to the cases and authorities, I am satisfied that the right in question was completely transferred to the granter. Besides the case of Dewar, referred to by the Lord Ordinary, the principle recognised in

PAUL
v.
BOYD'S
TRUSTEES.
1835.

OPINIONS.

PAUL
v.
BOYD'S
TRUSTEES.
1885.

the cases of *Erschine v. Hamilton*, 19th December 1710, M. 2846, and of *Riddle v. Riddle*, 4th January 1766, Kames's Sel. December, p. 311, M. 13019, are directly applicable."

LORD PRESIDENT HOPE observed,—“ There are many other cases which lead to the same conclusion. Such is the case of *Macdowall and Selkrig*, which was decided on the 6th of February 1824, and the still more important case of *Gordon's Trustees*, decided on 4th December 1821. These are decisive in support of the interlocutor. It is not material though the *jus crediti* was not specially in the view of the parties at the time. The general words employed are expressly intended to reach any rights not specially noticed.”

A jus crediti against a Trust-estate is attachable by Arrestment, where the obligation of the Trustee is to account, and not to denude of a specific heritable subject.

L.—GRIERSON v. RAMSAY.

Feb. 25, 1780.

NARRATIVE.

JOHN DICKSON conveyed his heritable estate to a trustee for behoof of his creditors, and by a deed of accession all his creditors concurred. The trust-deed did not specify the debts, nor was the trustee infert.

One of the creditors was Ebenezer Hepburn, of whom again Grierson was a creditor. After the trust-conveyance had been granted, but before the trustee had proceeded to sell the subjects, Grierson laid an arrestment in the hands of the trustee, and after the subjects were sold, he insisted in a process of forthcoming. In this action he was opposed by Ramsay, the trustee for the creditors of Hepburn, who had also become bankrupt, on the ground that the arrestment was inept, *First*, because it had not been used in the hands of the common debtor himself, but only of his trustee; and, *Second*, on the ground that at the date of the arrestment the trustee had no moveable effects belonging to Dickson in his possession, and that although he was vested in the heritable subjects, yet that these could not be attached by that personal diligence.

The Lords Ordered a Hearing in presence on the point, "How far an arrestment in the hands of a trustee, to whom an heritable estate is disposed for payment of creditors, is a habile mode of diligence to affect the proportion of the price of said estate, corresponding to the debts due to any of the creditors, though the estate was not sold at the time of the arrestment?"

GRIERSON
v.
RAMSAY.
1780.

First Interlocutor of Court.
July 29, 1779.

PLEADED FOR THE TRUSTEE.—At the date of the arrestment, the trustee for Mr. Dickson's creditors was not possessed of any effects attachable by arrestment, belonging to Mr. Dickson. At that time the moveable subjects were disposed of and accounted for, and as to the heritable estate, that was not validly attached, for no heritable subject is arrestable. The right to the heritable subjects was fully vested in the trustee. The subjects, therefore, were not liable to be attached by arrestment, but required to be adjudged from the trustee, for an adjudication and not an arrestment is the proper habile method of arrestment for attaching a right in its own nature heritable.

ARGUMENT FOR
TRUSTEE.

Prior to the Statute 1661, cap. 32, moveable bonds could not be arrested. That Statute declared, bonds bearing annual-rent moveable, except *quoad fiscum et relictam*. The Act 1661, cap. 51, was also necessary to render obligations in personal bonds, on which infetment had not followed, subject to arrestment. In the present case, there exists in the trustee an heritable right, although personally vested; and if a special statute was requisite in the above instances, it would certainly have been much more necessary to render an heritable right like this a subject of arrestment. Otherwise, every personal right to lands would be arrestable, whereas adjudication is undoubtedly the only mode of attaching such subjects.

PLEADED FOR THE ARRESTER.—Whether the subjects made over by Mr. Dickson to his trustee were heritable or moveable, the arrestment was competent to attach the interest which each of the creditors had in the produce of his effects. The very purpose of the trust-conveyances was to convert the subjects into money, and to divide the money among the creditors. The interest of each creditor in the effects conveyed is of a personal nature. It consists of a claim of accounting against the trustee,

ARGUMENT FOR
ARRESTER.

GRIERSON
v.
RAMSAY.
1780.

and each of them will have right to a certain sum of money arising from the sale of the effects. It is similar to the interest which the individual partners have in a company stock, which is of a personal nature, though the estate of the company may be partly heritable.

JUDGMENT.
Feb. 25, 1780.

The Lords "Repelled the Objections to John Grierson's arrestment, and sustained the same as sufficient to affect the dividend of the proceeds of the heritable subjects which belonged to Dickson; and which proceeds are now in the hands of Robert Maxwell, the trustee, effeiring to the debt due by Dickson to Ebenezer Hepburn."

OPINIONS.
MS. Notes.
Sir Ilay Campbell's Session Papers.

LORD BRAXFIELD observed,—“Every estate that is in a debtor must be affectable by his creditors by some mode of diligence. The question here is, What is the nature of the subject here, whether heritable or moveable? If Hepburn's interest was heritable, it is adjudgeable. If it is personal estate, it is arrestable. If every creditor had a real interest *pro indiviso* in subjects themselves, the trust would be inextricable. If each creditor inhibited and adjudged, it would create burdens, and prevent trustees from executing the trust. Suppose any creditor has not acceded, he may adjudge, and if he prevails in a reduction he will be preferable, and carry reversion. But here not creditor of the bankrupt, but creditor of a creditor. He must first carry the interest of his own debtor by arrestment. He may then adjudge the bankrupt's estate if he can set aside trust. But here his debtor has acceded, therefore cannot go farther than Hepburn. Personal debts not made real by the trust. Subjects not conveyed to all the creditors *pro indiviso*. But a *jus crediti* against the trustee, who must account. His duty not to convey to each creditor a certain proportion of the estate, but a personal action lies against him to sell and denude.”

LORD PRESIDENT DUNDAS observed,—“This is not a claim *ad factum prestantium*, but to account and pay. The obligation is a moveable one, and is carried by confirmation. Trustee must pay to him or account.”

OPINIONS.
Faculty Report.

In the Faculty Report the following statement is made,—“OBSERVED ON THE BENCH. Were the idea of a *pro indiviso* interest accruing to creditors in the whole estates conveyed to

trustees to prevail, it would render the execution of trust-rights inextricable. The effect of the trust-deed now in question was not to give such an interest, but merely to found against the truster a personal action arising to the creditors from their *jus crediti* in the estate of their debtor, in order to make him account to them for his intromissions. This *jus crediti* could not be effected by adjudication, and, therefore, is the subject of an arrestment, for by one or other of these diligences, a creditor is entitled to attach every estate belonging to his debtor. Accordingly, where the estate of a company is vested in a trustee, arrestment will carry to a creditor a share in that estate, whether heritable or moveable, indiscriminately."

GRIERSON
v.
RAMSAY.
1780.

II.—WILSON v. SMART.

In 1780, Mr. Tenant by a trust-settlement conveyed his whole estate, heritable and moveable, to trustees. The last purpose of the trust was to divide the residue among his children and grandchildren, in the proportion of three-fourths to his children James and Margaret equally, and the remaining fourth to the children of a daughter deceased.

May 31, 1809.
NARRATIVE.

The estate conveyed consisted partly of moveable and partly of heritable property, the heritable consisting of some houses in Edinburgh and a small field near Musselburgh. The deed empowered the trustees to sell the lands and heritages, if they should see proper, and to do every thing requisite and necessary for securing and making effectual the real and personal estates. The trustees made up their title to the heritable property by charging James, the son, to enter heir in general to his father, and, on his renunciation, by leading an adjudication in implement, upon which they obtained a charter and were infeft.

James, the son, contracted several debts. Wilson, one of his creditors, raised an inhibition both against him and against his father's trustees, and Smart executed an arrestment of his interest in the hands of the trustees. At this time, the subjects

WILSON
v.
SMART.
1809.

consisted of an heritable bond for £1200, being part of the moveable funds lent by the trustees, and of the field near Musselburgh. The trustees, disregarding the inhibition, sold the field, and uplifted the heritable bond. Wilson then executed a subsequent arrestment of the funds now rendered moveable.

In order to determine the claims of the competing parties, an action of multiplepinding was brought by the trustees.

ARGUMENT FOR
INHIBITER.

PLEADED FOR THE INHIBITER.—A deed of settlement in trust, executed *mortis causa* in favour of an heir, or of a set of heirs, must not be confounded with trusts executed *inter vivos*, for the purpose of a more convenient distribution of the funds of the truster among his creditors. Such a trust is never intended to alter the nature of the legal claims of the creditors against the truster. Their debts are not thereby converted from real into personal, or from personal into real rights. The trustee is only another hand substituted in place of the debtor's, for the purpose of a more speedy distribution, and the trust has only the effect of transferring the original *jus crediti* from the debtor against the trustee, but without thereby altering its nature. Whether, therefore, the subjects of such a trust be originally heritable or moveable, the debts of the creditors, whether real or personal, continue to retain their previous form.

A family settlement, executed *mortis causa*, gives operation to principles of a different nature. It is the deed of settlement which creates the original right in favour of the heir; and the right which is thus conveyed must derive its legal character from the subjects in which his interest is created. The operation of such a trust is not merely to give the heir a personal *jus crediti* against the trustees, but to give him a right to the subjects of the trust, whether real or personal, subject only to the limitation of a particular mode of management prescribed by the truster. In the case of a settlement *mortis causa*, the trustee comes in place, not of the truster, but of the heir or heirs in whose favour the trust is conceived. By the intervention of a trustee, the right of the heir to the estate of the truster is not legally altered.

The interest of the heir in the subjects of a trust must depend upon the actual form of those subjects, as much as if no trust

had intervened. While the subjects remain in an heritable form, the right and interest of the heir are of an heritable nature, and the infestment of the trustee must be regarded as his infestment. If the subjects were personal originally, or if in the course of management they had been converted from real into personal, his right must of necessity be personal, and must thus fluctuate with the form of the estate which was conveyed to him by his ancestor.

WILSON
v.
SMART.
1809.

At the date of the inhibition, the right of Captain Tenant was altogether heritable. At that period his right consisted entirely of the field at Musselburgh, and of an heritable bond. The only competent mode of diligence, therefore, was inhibition. An arrestment at that period would have been altogether inept. If the heir's right was heritable, it could not be carried by arrestment; and if it could not be carried by arrestment, it was necessarily the subject of inhibition; for to the operation of one or other of these diligences all rights heritable and moveable are subject. Inhibition has precisely the same effect as to heritage that arrestment has to moveables. Both are prohibitory, and not attaching diligences. Both tie up and render the subject litigious till diligence competent to transfer it can be used. Arrestment is not an attaching diligence, for it is only by a decree of furthcoming that the subject can be transferred. So also, in order to attach an heritable subject, inhibition requires to be followed up by the diligence of adjudication.

PLEADED FOR THE ARRESTER.—The distinction which is attempted to be drawn between a trust-deed for behoof of creditors and a trust-deed executed *mortis causa*, does not rest upon any sound principle. In both instances the truster is completely divested before the trust-right can have operation. In a trust *mortis causa*, the character of heir is necessarily excluded; and in the present case it was explicitly and judicially renounced.

ARGUMENT FOR
ARRESTER.

The heir's interest in the trust-estate required to be attached either by adjudication or by arrestment. An interest in the reversion under a deed *mortis causa*, does not require or admit of adjudication any more than an interest under a trust for behoof of creditors. There, therefore, remains only the diligence of

WILSON
v.
SMART.
1809.

arrestment. The case of Durie against Coutts, related to succession, which is governed by different rules from those applicable to the mode required by the creditor of an heir, to attach the interest of his debtor under a trust-deed *mortis causa*.

The inhibition used against the trustees, and that used against the common debtor, were both inept. The trustees were not indebted to the inhibitor. They contracted no new obligation, and in disposing of the heritable subject, they only discharged the obligation they undertook by accepting of the trust. As to the inhibition against the common debtor, his claim against the trustees was only a *jus crediti*. He could have made it effectual in no other way than by an ordinary action, and he might have obtained nothing, for the whole subject might have been required to discharge the debts. Besides, an inhibition is not an attaching, but merely a prohibitory diligence. By it the common debtor was interpellated from contracting any new debts, by which the estate might be carried off to the prejudice of the inhibitor, but he contracted no new debts. The debt on which the arrestment proceeded was an old debt, and arrestment was the only competent mode for attaching the common debtor's interest.

Interlocutor of
Lord Ordinary.
May 29, 1806.

LORD MEADOWBANK, Ordinary,—Found, “ That the interest of James Tenant in the funds in the hands of the trustees was attachable by Arrestment, but not by Inhibition.”

JUDGMENT.
Feb. 16, 1809.

The Inhibiting creditor having Reclaimed, the Court “ Adhered.”

OPINIONS.
Faculty Report.

“ At advising, one Judge thought the interlocutor of the Lord Ordinary erroneous. But the prevailing opinion was otherwise. The question was taken up as a case of nicety. Much would depend upon the shape of the deed, and the purposes of the trust. In some cases, notwithstanding the execution of a trust-deed, the heir of the truster was allowed to make up titles and vote as a freeholder. But in this case the trustees had unlimited management and control, and for an unlimited time. The heir could not have brought an action against them for the specific subject. The first purpose of the trust was to pay debt ; and it might have been necessary to sell the whole for that end. The decisions pointed at a distinction. The case of Durie and Coutts

was a question of succession, and the subjects were heritable at the time. But there may be many subjects heritable as to succession, and moveable as to diligence, such as bonds, secluding executors, and heirship moveables. The case of Grierson and Ramsay was thought an authority, which was not infringed upon by the other decision.

WILSON
v.
SMART.
1809.

“ The Lord Ordinary, Meadowbank, said, that he had been aware of the difficulty ; and, in pronouncing his interlocutor, proceeded upon the ground that inhibition was inept. It could not tie up the hands of the trustees, and was inadequate to prevent them from selling. It might prevent Tenant contracting future debts ; but this was a past one. It was not an attaching diligence, and could not carry his interest in the hands of the trustees. Had Wilson begun by citing the trustee in a summons of adjudication, and thus rendering the subject litigious, he would not have thought himself at liberty to disregard the case of Durie and Coutts ; but here it did not apply,— or, had Wilson been a prior adjudging creditor, the case would have been altogether different, and he would have been inclined to prefer him. But here there was room for personal diligence, and the *jus crediti* was sufficiently attached by arrestment.”

A Reclaiming petition was afterwards presented, and allowed May 31, 1809. to be seen and answered ; but a mutual application was afterwards made to the Court, stating, that the parties had settled the case, and praying to be ranked *pari passu*, which was accordingly done.

-
1. In the case of WILSON v. SMART, the lands were ultimately sold, so that the residue of the trust-estate was moveable. If, however, the trustees had not sold the lands, and the residue had consequently been heritable, would the arrestment have been sustained ? It may be contended, on the one hand, that, at the date of the arrestment, the right of the residuary legatee was merely an obligation

against the trustees to account, and not a right to demand any specific heritable subject, and that such a right is personal, and therefore arrestable. On the other hand, it may be contended that the residue which actually fell to be made over to the legatee was heritable, and that therefore an arrestment was inept. No case has occurred in which this question has arisen, but the principle of the judgments in the case of *Grierson v. Ramsay*, and that of *Wilson v. Smart*, would seem to apply, and to sanction the competency of an arrestment.

2. In the case of *KYLE'S TRUSTEES v. WHITE*, November 14, 1827, LORD ALLOWAY observed,—"As to the competency of attaching the interest under a trust-

estate by arrestment, there is a much more important case than any quoted in the papers, namely, that of *Grierson v. Ramsay*, where an arrestment in the hands of a trustee, before the lands were sold, was held effectual. This was the first case on the point, and it has been followed by many others, establishing the principle that the *jus crediti* under a trust-deed is arrestable. On the same principle, I think the arrestment in this case by David Kyle's trustees is effectual. It is said, that because there was a trust-deed for behoof of creditors, individual creditors could not attach; but it is clear that any creditor may take steps for securing his debt, notwithstanding the existence of a trust-deed."

Where Land is conveyed to Trustees by a mortis causa settlement, with positive instructions to sell the Land conveyed, or where it is clear from the Deed that the Truster intended that the Land should be sold, the right of the Beneficiary entitled to the residue of the Trust-funds is moveable, but where the Land is conveyed with merely a discretionary power to sell, the legal character of the residue depends on the circumstance of the power to sell having been exercised or not.

I.—DURIE v. COUTTS.

Nov. 30, 1791. IN 1771, Thomas Durie, whose residence was in the Isle of
 NARRATIVE. Man, executed in Scotland a trust-deed of settlement in the Scots form. The deed narrated that it was the truster's purpose that his whole heritable and moveable property should be vested in trustees, and that certain houses situated in the town

of Ramsay, in the Isle of Man, should be sold if the trustees thought fit, but that they were not to be sold during the life of Ann Durie, his spouse, to whom he disposed them for her life-rent use only.

DURIE
v.
COUTTS.
1791.

The deed made over to the trustees all his property, heritable and moveable, and, in particular, an heritable debt affecting certain lands in Scotland, for behoof, in the first place, of the heirs of his body, "whom failing, to David Durie; whom failing, to his nieces, Jane Durie and Margaret Durie, equally, and to the longest liver of them." Full power was granted "to the trustees to intromit with, transact, uplift, and discharge the sums and others above disposed."

The succession devolved on Jane and Margaret Durie. In 1783, Margaret Durie executed a will according to the forms used in the Isle of Man, by which she bequeathed to her mother and sister "all such sum and sums of money which were bequeathed to her by her uncle, and which are now lent at interest on the securities of estates in Scotland." Soon after executing this will Margaret Durie died.

In 1788, Jane Durie, by a nuncupative will, bequeathed to her mother all her goods and effects, both real and personal. On her death, Mrs. Durie proved both a previous will, and also the nuncupative will in the courts of the Isle of Man, as executrix to her daughter.

Alexander Coutts was both heir-at-law and nearest of kin of Jane Durie. A competition took place between him and her mother, in regard to the heritable debt in Scotland. By the law of England the mother was entitled to it, both under the will of the daughter and as legal heir. By the law of Scotland, Mr. Coutts was entitled to succeed to it. The issue of the competition depended on the point, Whether the right of Jane, under Mr. Durie's settlement, was heritable or moveable?

PLEADED FOR THE HEIR-AT-LAW.—The bond in question is *sua natura* an heritable subject. Being secured by infestment, it is only transferable by deeds *inter vivos*, according to the law of Scotland. Had the debt been directly conveyed to Jane Durie by her uncle, it cannot be disputed, that it must have been accounted heritable. The only question at issue therefore

ARGUMENT FOR
HEIR-AT-LAW.

DURIE
v.
COUTTS.
1791.

is, Whether the nature of the subject was altered by its being conveyed to trustees for behoof of Jane Durie ?

With regard to the distinction of heritable and moveable, and the legal consequences thence arising, it is immaterial, whether a subject is held by the party interested, in his own name, or by a trustee for his behoof. It is very common for proprietors of landed estates to convey the same to trustees, for the better clearing off debts, or for other purposes of the like nature. It was never, however, supposed that the effect of such a conveyance was to convert the land estate into a moveable subject, so as to be disposable by testament, and to be taken up by the next of kin.

It is true, that the right of Jane Durie consisted in a personal claim against the trusters. The debt in question was not vested in her person by a complete feudal right. Her claim under the trust, therefore, must have been made effectual by a personal action against the trustees, to denude in her favour. The point, however, to be considered is, What was the subject of Jane Durie's right or interest ? It was an heritable debt secured by infestment upon a land estate in Scotland. Even a personal right to an heritable subject is heritable. Where a man acquires a land estate by a disposition without infestment, his right certainly is personal, yet it cannot be maintained that it is therefore moveable, and must descend to executors. In short, every right affecting land is properly heritable, whatever the nature of that right may be, whether completed in the feudal form or not, and even although incapable of being so completed as in the case of leases, which are heritable with respect to succession, as much as rights of property. At the time of Jane Durie's death, the debt in question was clearly an heritable right. Had she required to maintain action against the trustees at any time of her life, the conclusion of the action must have been, not for a sum of money, but that the trustees should be ordained to denude in her favour, so soon as the other purposes of the trust were satisfied. What happened after her death cannot change what was heritable at that period into a moveable subject, for, in all questions with regard to heritable and moveable, matters must be considered as they stood at the death of the person whose succession is to be disposed of.

PLEADED FOR THE LEGATEE.—The present question relates to the right of the residuary legatee. There is, however, no distinction between that right and the right of any other person interested in the succession. The plea of the heir-at-law resolves into this, that all the persons interested in the succession had a right *pro indiviso* in every one of the subjects of which Mr. Durie's estate consisted.

DURIE
v.
COUTTS.
1791.

ARGUMENT FOR
LEGATEE.

The whole trust-estate was under the absolute power of the trustees. The necessary consequence of this is, that the interest of the residuary legatee was not a direct and immediate right in the specific subjects of which the trust-estate consisted, but was a right of action against the trustees to account. This was the idea of the testator himself. In the trust-deed he states, that it was the produce of his heritable and moveable estate that was to be applied in the manner therein aftermentioned. For this produce the trustees were to be accountable to those interested, but over the specific subjects they had in all other respects an absolute power. They might convert the whole property into money. They might change heritable subjects into moveable, and moveable into heritable. In short, they were restrained by no obligation but that of restoring the value, and therefore were plainly debtors to that amount, the beneficiaries under the trust being the creditors. Of these last, Jane Durie was the chief, having a *jus crediti* in this respect, and nothing else, a moveable right disposable by testament, and falling to next of kin. If the right of the beneficiaries depended on the particular nature of the right that composed the trust-estate, then, in consequence of the extensive powers of the trustees, a person's interest might have been rendered heritable one day, the next day moveable, and the third heritable again. All this, too, might be very proper management of the trust-estate, and might be done even without the knowledge of the party interested, much less without any control on his part.

LORD DREGHORN, Ordinary, Found, "That in virtue of the trust-disposition by Thomas Durie, the persons for whose behoof that disposition was granted, had not a *pro indiviso* share in the subjects conveyed to the trustees, but only a personal claim or ground of action against them to account: Finds also,

Interlocutor of
Lord Ordinary.

DURIE
v.
COUTTS.

1791.

JUDGMENT.
Nov. 30, 1791.

that the moveable succession of Thomas Durie must be regulated by the law of the Isle of Man, and not that of Scotland."

The Heir-at-law having Reclaimed, "The Lords Altered the first part of the interlocutor of the Lord Ordinary, and preferred Mr. Coutts to the sums *in medio*, due by the heritable security; but adhered to the last part of the Lord Ordinary's interlocutor, and found, that the moveable succession of Margaret Durie and Jane Durie fell to be regulated by the law of the Isle of Man, where they had their domicile at the time of their respective deaths."

OPINIONS.
MS. Notes.
Baron Hume's
Session Papers.

LORD JUSTICE-CLERK BRAXFIELD observed,—“In the case of a company, though effects heritable, claim of a partner against the company is moveable. Just so in case of a trust where estate meant to be sold and money to be paid, claim against trustee is moveable and testable.”

LORD PRESIDENT CAMPBELL observed,—“I know the case of Grierson. It was a disposition to sell estate and pay debts without making these debts real. It gave no claim against the estate until converted into money. It was not a conveyance of the estate to creditors *pro indiviso*. It left their right a mere claim to a sum of money. That case was well decided. But this case is quite of a different nature. It is a conveyance of the funds to those ladies *pro indiviso*. It might as well be said that Lord Hyndford's right to his estate in the persons of trustees was executry.”

OPINIONS.
MS. Notes.
Lord Dreg-
horn's Session
Papers.

On the Session Papers in the cause, LORD DREGHORN, who was Ordinary, has written,—“Whether the right which an heir has against trustees, who have power by the trust to turn the estate into cash, is heritable or moveable, so as to be devised by testament, and whether the *lex domicilii* is to regulate the succession or the *lex rei sitæ*. As to first point, the residuary legatee is on the same footing with the special legatees as to this question. Has no more a *pro indiviso* right than any of them; and, therefore, as to this point, the interlocutor seems right. As to the second, a nuncupative will, executed in England, seems not available to carry moveables in Scotland, for the reason assigned by Mr. Erskine; but then this is of no consequence for the right heir-at-law by the law of the Isle of Man, whether

the subject be considered in one light or the other, so adhere to this too."

DURIN
v.
COUTTS.
1791.

LORD DREGHORN again writes,—“Alter unanimously first part of interlocutor. Case of Grierson did not apply. I altered, myself. Adhere as to the second. Lord Justice-Clerk at first was for first part of interlocutor, but altered after consideration, and so did I.”

On the Session Papers, LORD PRESIDENT CAMPBELL has written,—“Foreign will bequeathing heritage in Scotland. Heritable debt, though in person of trustee, was heritage in truster. Case of Grierson not similar. The debts were not made real upon the subject. The trust-estate was not conveyed to them so as to give each creditor an interest in the estate itself *pro indiviso*. It was only conveyed to a trustee for the purpose of selling and dividing the price among them.”

OPINIONS.
MS. Notes.
Sir Hay Camp-
bell's Session
Papers.

II.—ANGUS v. ANGUS.

By trust-deed of settlement, William Angus conveyed to trustees his whole property, heritable and moveable. The trustees were empowered to sell and dispose of the whole subjects, to uplift the whole debts, and sums of money due to the truster, “and to do all necessary diligence for the recovery of the whole premises, and converting the same into money.”

Dec. 6, 1826.
NARRATIVE.

The deed further authorized the trustees to enter into submissions, to appoint factors, &c., “and generally with power to do and execute all other things necessary for settling, transacting and disposing of, or rendering effectual, and converting into cash my said subjects, in the same way and manner as I could do myself, if in life.”

The appointment as to the residue was in these terms :—“I hereby ordain and appoint the whole free residue or remainder of my estate, real and personal, after satisfying the before mentioned burdens and provisions, to be divided into four just and equal shares, as soon after my decease as circumstances will permit ; and that being done, I authorize, ordain, and appoint

ANGUS
v.
ANGUS.
1825.

my said trustees to lay out and invest on undoubted security one of the said fourth shares for the use and behoof of my son, the said Charles Angus, in life, for his life, for his use only, and to his children lawfully-procreated, or to be procreated, and in life at his death, in fee, equally amongst them, share and share alike. Declaring always, that the part or share falling to each of the children of the said Charles Angus, shall remain under the care and management of my said trustees, until said children shall respectively attain the age of twenty-one years complete, or be married with the approbation of the majority of my said trustees then acting, and to whom I hereby grant and commit ample powers to settle and establish the share of each of the said children, in such manner, and with and under such conditions and stipulations as may then be judged expedient to render the same most useful and beneficial to each of the said children, and their respective representatives. Another of the said fourth shares I authorize, ordain, and appoint my said trustees to pay over to my second son, the said William Angus, his heirs, executors, or assignees."

The deed further declared, "That all and every sum or sums which shall, in virtue hereof, lapse and return to my said trustees during the continuance of this trust, shall pertain and belong to my lawful grandchildren then in life, share and share alike."

Mr. Angus died in 1822, leaving the greater part of his fortune in heritable bonds. His second son, William, to whom one of the shares of the residue was appointed to be paid over, predeceased him, without issue. The question then arose, Whether the fourth share provided to him by the trust-deed, to the extent of his proportion of the heritable property, descended to his heirs, or to his executors? A multipointing was brought by his father's trustees, in which the competing parties were the only surviving sister of William, and the only son of his eldest brother deceased.

ARGUMENT FOR
HEIR.

PLEADED FOR THE HEIR.—If a trustor direct his whole estate to be sold, and the price to be distributed among certain persons, the trustees must obey his injunction, and the rights of these persons being merely rights to shares of a sum of money,

they are moveable, and descend to their executors. But when the truster has not *enjoined* a sale of his estate, but has merely *empowered* a sale, should that be necessary for paying debts and legacies, and after satisfying these claims, has provided the whole residue of his estate, real and personal, to be divided into shares, which he allots to certain individuals, the case is different. The trustees then hold the estate for the benefit of the parties to whom the residue is provided, subject to the burden of the debts and legacies. When these are paid by the application or sale of a part of the estate, the parties interested are entitled to require the trustees to make over the estate which remains. Each is entitled to his rateable share of the residue, both of the personal and the heritable estate. The right to the one, as it relates to a moveable subject, descends to executors, the right to the other, being a right to an heritable subject, descends to heirs.

The claim with regard to both heritable and moveable estate is a *jus crediti*. But *jura crediti* descend to heirs or executors, according to the nature of the subject to which they relate. In the destination of a landed estate to heirs by a marriage-contract, the heir has a *jus crediti* under the contract, but this *jus crediti* descends to his heir, not to his executor. In a contract of sale, the purchaser has a *jus crediti* against the seller for implement, but the heir, and not the executor, is entitled to demand implement.

The truster, in the present instance, vested his whole estate, heritable and moveable, in trustees. As it might be necessary to convert a part of his heritable estate into money, in order to fulfil the purposes of the trust, he gave the trustees a power of sale. But he did not appoint that they should convert the whole heritable estate into money. The difference between a faculty or power, given to be exercised, if circumstances should require it, and a positive appointment, is obvious. The truster has appointed "the whole free residue, or remainder of his estate, *real and personal*, to be divided into four just and equal shares.

It is a mistake to suppose that a *jus crediti* is always of a personal nature, so as to be descendible only to executors. A *jus crediti* may apply to goods, to lands, to services, as well as to sums of money. The obligation is no doubt personal in one

ANGUS
v.
ANGUS.
1825.

ANGUS
v.
ANGUS.
1825.

sense, but that does not affect the right of succession. A personal obligation to sell lands descends to the heir of the purchaser. A personal obligation to grant a lease descends to the heir of the lessee. The succession is regulated by the quality of the subject to which the obligation relates. If it be heritable, the *jus crediti* descends to the heir; and if moveable, to the executor.

ARGUMENT FOR
EXECUTOR.

PLEADED FOR THE EXECUTOR.—The direction of the trust-deed clearly indicates the intention of the truster, that the trustees in making the division of the residue were to operate upon and divide a moveable residue, into which the estate was to be converted. It was the understanding of the truster, that all preferences among his grandchildren were to be excluded, and that they were to take their portion of the moveable shares upon the decease of their parents.

When a trust is created, not for the purpose of preserving the estate for the heir-at-law, but for the purpose of dividing the estate, or the reversion of it, among other objects of the truster's choice, the parties favoured have no claim to any particular part of the truster's heritable estate vested in the trustees. They have nothing but a personal claim to call upon the trustees to make a division of the remaining subjects of the trust, and to give to each party interested his appropriate share. The truster, in the present instance, contemplated the distribution of the residue as a moveable estate, and, consequently, the succession to the shares of the residue must follow the law of moveable succession. He neither contemplated nor intended a division of the different shares of his estate into the separate qualities of heritable and moveable, so as to leave two residues, the one going to the heir and the other to the executor. The trustees are directed *to pay over* to William Angus, his heirs, executors, or assignees, the fourth share now in dispute. This is a destination to executors. A direction *to pay* to executors or assignees a succession of an heritable nature, is new in the annals of conveyancing.

It is true that the trust-estate consisted partly of heritable, and partly of moveable subjects. But then the whole estate was vested in trustees, to be converted into money, and to be applied,

in the first place, to the primary purposes of the trust. The beneficiaries could claim only under the trust-deed, and the nature of their claim was to a share of the residue of the free proceeds that might remain after the primary purposes of the trust should be accomplished. This was merely a personal claim against the trustees. Farther, it was not a right to demand that the trustees should make over to them an heritable subject, or part of an heritable subject, in which they had a vested interest. It was a right merely to demand that the trustees should make over a certain proportion of the balance of the money, after they should have performed the will of the truster in every other point, and had ascertained what was the free remainder.

ANGUS
v.
ANGUS.
1825.

LORD MACKENZIE, Ordinary, Found, "That the direction of the trust-deed of William Angus, the father, which is expressed in these words—'Another of the said fourth shares I authorize, ordain, and appoint my said trustees, or trustee, to pay over to my said second son, the said William Angus, his heirs, executors, or assignees,' must be interpreted, to direct the said payment to be made to the heirs *in mobilibus*, or executors of the said William Angus, the son, not to his heir *in immobilibus*; and, therefore, finds that the claimant, Mrs. Elizabeth Angus, has right to the said share, in preference to the other claimant, Thomas Angus, and prefers her accordingly, and decerns."

Interlocutor of
Lord Ordinary.
March 11, 1824.

The Heir having Reclaimed, the Court unanimously "Adhered."

JUDGMENT.
Dec. 6, 1825.

LORD GLENLEE observed,—“There are no grounds for altering the interlocutor. This case has no analogy to that of Durie, mainly founded on by the heir. There the trust was not for gathering in the proceeds, and distributing them among a number of persons. The trustees were directed by the testator to hold the *universitas*, and in particular a certain heritable bond, for behoof of the heirs of his body; whom failing, of the heirs according to the destination in the settlement; so that from the beginning it was held for the behoof of special heirs. The legatees had no *nexus* on any particular subject, but the heirs had. The *universitas* was left to be held for the destined heirs from the beginning, and not merely for the

OPINIONS.

ARGUES
v.
ARGUES.
1825.

execution of purposes of trust. The present case is very different ; there is no beneficial interest in the subjects constituted to the parties, but only a claim for the share of the residue, which must descend to executors."

LORD PITMILLY observed,—“ The Lord Ordinary’s view is very simple and decisive, and the whole argument for the executor is most successful, and in nothing more so than in pointing out the great distinction between this case and that of *Durie*. In both cases, the right was that of calling the trustees to account ; but in *Durie*’s it was a right to call them to account for a special heritable subject ; and here it is a right to call them to account for a share of the residue of the whole estate. This right might have been attached by arrestment, and it would have lapsed by the predecease of William, had there been no destination to heirs and executors ; and these are criteria which established it to be of a moveable nature, and descendible to executors.”

LORD ALLOWAY observed,—“ It is impossible *ab ante* to presume an intention on the part of the testator not to settle the destination of his property, but to leave it to be determined by the circumstance of the trustees selling his heritage, or retaining it unsold. All cases of this kind depend on the will and intention of the testator. The grounds in the Lord Ordinary’s interlocutor are sufficient ; but the true rule is the intention of the testator. If this be not clearly expressed in the deed, the nature of the property may assist in construing it ; but if there ever was an *enixa voluntas* to convert an estate into money, it appears in the present case.”

LORD JUSTICE-CLERK BOYLE concurred.

OPINIONS.
Faculty Report.

In the Faculty Report it is stated,—“ It was remarked on the Bench, that all cases like the present must depend chiefly upon the intention of the truster, which must be gathered from the whole tenor of the deed. All the previous cases have been decided on this principle. In that of *Durie v. Coutts*, the trustees were directed to hold the *universitas* of the succession, and especially the heritable bond for £2000, for the behoof of certain persons. But here the truster evidently intended his trustees to collect and convert his whole estate into one mass, to be immediately disposed of, and the *residue*, for there is no con-

veyance of the estate to the legatees, to be divided equally among the favoured parties. The latter had only a *jus crediti* affecting a moveable subject ; and, as such, it must descend to their executors."

ANGUS
v.
ANGUS.
1825.

III.—BURRELL v. BURRELL.

By trust-disposition and deed of settlement, William Burrell conveyed his whole property, heritable and moveable, to trustees. The objects of the trust were declared to be : 1. "To the end and intent that my said trustees, or the acceptors, &c., may, as soon after my death as with propriety can be done, and as may seem to them eligible and expedient, sell and dispose of my said whole estate and effects, heritable and moveable, by public roup or private bargain, as they shall think proper, and recover the prices and proceeds thereof, and grant dispositions and conveyances of the same in favour of the purchasers, who shall noways be responsible for or concerned with the application of the prices thereof, and may uplift and receive, and, if necessary, charge and sue for payment of the whole debts and sums of money, heritable and moveable, which shall then be due to me, and, upon payment, to grant receipts, &c., or conveyances of the said debts, and may bind my heirs and representatives in absolute warrandice of such dispositions, conveyances, discharges, and other writs so to be granted by my said trustees, who shall themselves be bound in warrandice thereof from fact and deed only ; and to the end and intent that my said trustees may apply the whole free produce of my said estate and funds, in the first place, for defraying the expense of managing and executing the trust."

Dec. 14, 1825.
NARRATIVE.

The second purpose of the trust was the payment of the truster's debts. The third was for payment of an annuity to his widow, and the liferent of one of the houses. The fourth was for payment to his second and third sons each of £800, and to each of his daughters £600, payable on the sons attaining twenty-five years of age, and the daughters thirty.

BURRELL
v.
BURRELL.
1825.

The fifth purpose of the trust was declared in these terms :—
“ After satisfying these several claims, I appoint my said trustees to pay over the reversion of the proceeds of my said whole estate and effects, heritable and moveable, above conveyed to them, or to denude of such part thereof as may then be in their hands unconverted into money, to and in favour of William George Burrell, my eldest son, but not in any event till he has attained the age of twenty-five years complete, and his heirs and successors whomsoever, to whom I hereby devise and provide the reversionary interest in my said whole estate and effects, and this over and above the estate of Lynetoun, already vested in my said son, and heritable bonds belonging to me, affecting the same ; and in the mean time, and until the reversion of my said estate shall be paid or made over to my said son, I authorize and empower my said trustees to pay to him such sum or sums of money as they my said trustees may think proper, or can conveniently spare from the proceeds of my said estate.

“ But in any event I provide and declare that my said son, William George, shall be entitled, when he arrives at the said age of twenty-five years complete, to demand, and my said trustees shall be accordingly obliged to pay to him and his fore-saids, the sum of £500 sterling, with the legal interest thereof from that term till payment, and a fifth part more of liquidate penalty in case of failure ; all which payments shall of course be imputed in payment and satisfaction of the said reversionary interest.

“ Moreover, I empower my said trustees to denude of the reversion of my said estate to the said William George Burrell and his foresaids, even during the life of my said wife, on investing a capital sum, sufficient for the payment of her said annuity, on proper heritable security, payable to her in liferent, and to the said William George Burrell and his foresaids in fee. Lastly, I provide and declare, that in the event of my said eldest son William George dying before the said age of twenty-five years complete, without leaving lawful issue of his body, the said reversion of my estate and effects above provided to him shall be divided by my said trustees among my surviving children, equally among them, and their heirs and successors *per stirpes* respec-

tively, in such shares and proportions, more or less, as shall appear to my said trustees expedient and proper in the circumstances."

BURRELL
v.
BURRELL.
1825.

On the death of Mr. Burrell, the trustees entered into possession, and sold off his moveable effects, but did not make up any title to the heritable property. The eldest son, William George Burrell, died unmarried, after attaining twenty-five years of age. At this time the heritable subjects were unsold, but the trust was still subsisting. The widow was still alive; one of the daughters had not been settled with; and the other had not attained the requisite age for receiving payment of her provision.

On the death of the eldest son, the second son claimed right to the heritable subjects as heir-at-law of his brother. The younger children insisted that the reversionary interest in them was moveable, and, in order to determine the competition, a multipoleinding was brought by the trustees.

PLEADED FOR THE HEIR.—A subject held in trust descends in the same manner as it would do, if it had not been conveyed to trustees. If, therefore, it is heritable, it retains its destination to heirs, until by some legal act that destination is altered, and it is made to descend to executors. The mere circumstance that the subject is conveyed to trustees does not alter the nature of the interest of the person who has made the trust, or in whose favour it is conceived. A person executing a trust for the payment of his debts, with the most ample powers of sale, does not thereby change his interest in his estate. He remains the feudal proprietor, and his infeftment continues in full force, burdened, indeed, with the trust-deed, but not extinguished by it, until the power of sale given to the trustees has been exercised by them.

ARGUMENT FOR
HEIR.

The trust-deed, in the present instance, contains no imperative direction to sell. Sale is not the object of the trust. The deed declares five different purposes which were to be fulfilled by the trustees. A power of sale is given as one of the means for fulfilling these purposes. There is also a power of recovering debts, heritable and moveable, as another of the means of accomplishing the trust. It is in the declaration of the special

BURRELL
v.
BURRELL.
1825.

purposes of the trust that the intention of the truster is to be discovered. The four first purposes of the deed, viz., the expense of the trust,—payment of debt,—the provision to the widow,—and the provisions to younger children, are all separate from the interest or reversion provided to the heir. The trustees were entitled to accomplish the four first purposes of the trust by sales, or otherwise ; but if the heir chose to take these burdens on himself, and satisfy the claims against the trust-estate to the satisfaction of the trustees, that would have been a fulfilment of the trust. It is in the *fifth* purpose of the trust that the truster declares his intention with respect to the reversion which he provides to the heir. In that purpose he directs the trustees, after satisfying the several claims mentioned in the deed, “to pay over the reversion of the proceeds of my said whole estate and effects, heritable and moveable, above conveyed to them, or to denude of such part thereof as may then be in their hands unconverted into money, to and in favour of William George Burrell, my eldest son.”

The heir was to have everything that should remain, after satisfying the four objects of the trust. The trustees, however, were not bound to convert every thing into money, in order to pay the heir in that shape. If it had been necessary to convert the heritable estate into money, in order to fulfil the purposes of the trust, then the proceeds were to be paid over. But if the trustees were able to fulfil the purposes without a sale, then they were to denude themselves of the heritable estate in favour of the truster's heir.

The truster did not fetter his trustees, because a sale of his whole estate might have been absolutely necessary. They had, therefore, a power given to them to sell. But in preserving the heritable property for the heir, if they were able to do so, they were doing what the truster had enjoined them to do. They were not exercising a discretion, but placed in circumstances which saved them from the necessity of being called upon to exercise it.

ARGUMENT FOR
EXECUTORS.

PLEADED FOR THE EXECUTORS.—The question at issue is. Whether the trustees of William Burrell are to convey the reversion of the trust-estate to the heir or the executors of Wil-

liam George Burrell, the truster's eldest son? There is no question regarding the heritable right remaining in the truster, as distinct from that created by the trust-deed. The only point at issue is, the nature of the right which the trust-deed created. Both parties must refer their claims to that source. The present competition, therefore, must be determined by the terms of the trust-deed itself. The truster was the uncontrolled proprietor of the whole subjects conveyed by the deed. Upon him alone it depended, whether the subjects he possessed should be continued heritable, and descend to the heir of his residuary disponent, or be converted into money, and thereby become divisible among his executors. The means of deciding this question are exclusively to be sought in the truster's declarations of intention as contained in his trust-deed.

BURRELL
v.
BURRELL.
1825.

The succession to William George Burrell cannot be dependent on the discretion of his father's trustees. The nature of the trust-estate must be ascertained not from the act of the trustees, but from the directions which are given by the truster for their government. The legal rights of the beneficiaries are, therefore, independent of the mode in which the trustees may perform the duty imposed upon them, and are to be determined not by the situation of the estate at the expiry of the trust, but from the object had in view at its commencement, and the wishes of the party from whom these rights were acquired.

Although the trust-deed in question conveys heritage, and confers a residuary interest on William George Burrell, it nowhere conveys the heritable subjects for his behoof, so as to give him a direct interest in them, subject merely to the performance of the other purposes of the trust. The trust-deed does not contain merely a power to sell. The truster assumed that it would be necessary to sell, and expressly directed that the very first step to be taken by the trustees should be the conversion of the whole trust-subjects, heritable and moveable, into cash.

By force of the trust-deed the right of the residuary disponent was moveable, as his right was not a right to share the heritage, but to share the price of the heritage when sold. From the death of the truster, or, at least, from the date of the acceptance of the trust by the trustees, the heritable character of the

BURRELL
v.
BURRELL.
1825.

subjects conveyed was effaced, in so far as concerned the parties holding the beneficial interest under the trust. These parties held merely a right of credit against the trustees, and that right of credit was by the terms of the deed creating it applicable to shares of the price of the subjects conveyed. It is true, that the beneficiaries had indirectly an interest in the heritable subjects. But that is nothing to the purpose. Every person who holds a right to demand payment of a sum of money, out of the price of an heritable subject, has an interest in that heritable subject. But still the interest is in the price of the subject, and not directly in the subject itself. It is, therefore, a moveable interest in a question of succession.

Sale is expressly mentioned as the leading purpose of the trust, and that direction must fix the character of the rights of the parties claiming under it. Although the subjects have not been actually sold, that will be presumed to have been done. The right of the residuary legatee must be tried by the same rule as if the trustees had instantly done that which they were directed to do, and as if the question had arisen regarding the succession to the balance of the price. The whole other clauses in the deed relate to the application of the proceeds of the sale of the subjects conveyed. The fifth clause directs the trustees to pay the reversion of the proceeds, or to denude of the subjects unsold. The right, however, created in favour of the residuary legatee was moveable. The trustees were directed to sell the whole subjects conveyed, and the circumstance of some of the subjects remaining unsold, cannot alter the succession of the right vested in the legatee. The divestiture of the trustees, even of the subjects unsold, must still take place in favour of his executor.

But even if it could be held that after satisfying the several claims of the parties interested in the trust, the obligation to denude of the heritage which remained unsold conferred on the residuary disponent a direct interest in that part of the trust-subjects, and that his right thereby became heritable, still that could only take place after all the other claims were satisfied. Until these claims were satisfied, there was no obligation to denude of any specific heritable subjects, and consequently no direct heritable right in the person of the residuary disponent.

Until the whole purposes of the trust were accomplished, he had merely a general right of credit against the trustees for the balance of the price of the whole subjects, directed to be sold under the leading provision of the trust. But the other claims were not satisfied at the death of William George Burrell. His right, therefore, at the period of his death, remained merely a moveable right, a *jus crediti* against the balance of the price of the trust-subjects.

BURRELL
v.
BURRELL.
1825.

LORD MEADOWBANK, Ordinary, Found, " That by the terms of the disposition and settlement of the deceased William Burrell, the raisers of the multiplepinding were empowered to convert the whole of the real estate of the testator into money, for the special purposes therein enumerated, and thereafter to convey the residue to the now deceased William George Burrell on his attaining the age of twenty-five years complete, his heirs and successors ; but that if the said power of sale was not exercised to the extent of converting into money the whole of the said heritable estate, it was incumbent upon the said trustees to denude of such parts thereof as should be remaining unsold, to and in favour of William George Burrell, as aforesaid ; and that failing the said trustees making payment of the said residue, and denuding of whatever part should remain vested in their persons when the said William George Burrell should arrive at twenty-five years complete, and the other purposes of the trust were discharged in manner therein provided for, a right was vested in the said William George Burrell to require the said trustees to make payment of the said residue, and denude in his favour of the parts of the heritable property remaining undisposed of in their hands :—That, from the special terms of the disposition in favour of the said trustees, the legal character of the right of the said William George Burrell to the reversion of his father's succession was virtually made to depend upon the extent to which the discretionary powers conferred on them should be exercised, and that the same is to be deemed a right to moveables descendible to executors, in so far as the real estate was converted into money, but heritable, and to be taken up by his heir-at-law, in so far as concerned those parts thereof which remained in the hands of the trustees at the expiry of the trust ; and, That the subject in dispute being vested in heritable estate,

Interlocutor of
Lord Ordinary.
Dec. 2, 1823.

BURRELL
v.
BURRELL.
1825.

Note of Lord
Ordinary.

the right to require the trustees to denude thereof has been duly taken up by the claimant, Ferguson Burrell, heir-at-law of the deceased William George Burrell."

In a Note to his Interlocutor, the Lord Ordinary observed,—
"The Lord Ordinary apprehends that this case must be decided in the same way as if the trustees had actually denuded of those parts of William Burrell's heritable estate which remained unsold after the other objects of the trust were accomplished, and had therefore been retained by them in the same state in which they had received them ; and in that case it is clear there could have been no doubt that the subjects would have belonged to his heir, and not to his executors ; therefore preferred the claim of the said Ferguson Burrell, and decerns."

First Interlo-
cutor of Court.
June 9, 1824.

The younger children having reclaimed, the Court Altered the interlocutor reclaimed against, and Found, "That the reversionary interest in the estate, as well as the sum of £500 appointed to be paid to Mr. George Burrell on attaining the age of twenty-five years, or any balance that may be due thereon, is to be considered moveable, and descends to the executors and nearest of kin of the deceased William George Burrell as his heirs *in mobilibus*, after the purposes of the trust are fulfilled, and decern."

Second Inter-
locutor of
Court.
May 19, 1825.

Against this judgment the heir-at-law having reclaimed, the Court "Altered the Interlocutor reclaimed against, so far as regards the heritable subjects which were unsold in the hands of the trustees, at the period of William George Burrell's death," and Found, "That the same descends to the petitioner, the heir-at-law of the said William George Burrell, after satisfying the purposes of the trust, and to that extent adhere to the interlocutor of the Lord Ordinary ;" but Found, "That the legacy of £500, or any balance that may be due thereon, descends to his executors and nearest in kin as his heirs *in mobilibus*, and to that extent adhere to the interlocutor reclaimed against, and decern."

JUDGMENT.
Dec. 14, 1825.

The younger children having again Reclaimed, the Court "Adhered."

OPINIONS.

LORD BALGRAY observed,—"This case is to be viewed as a *quæstio voluntatis* ; and it is evident, from the terms of the

deed, that the trustees were vested with an unbounded right of property, and had a full power of sale. All the cases referred to shew that, where trustees hold an estate for a particular party, he in fact possesses through them. But this is a question of a different nature. The trustees held the property to the end and intent that it 'may' be sold; and the word 'may' I consider to be quite as imperative and as powerful as if it had been said if they 'shall' sell. In these circumstances, the children could have no right to any specific subject—they could not demand any special subject—the right was out and out in the trustees; and all that the children possessed was a mere claim against them—a simple *jus actionis*, which is moveable. This was the ground of Lord Alloway's interlocutor in the case of *Gordon v. Harper*, where it was held that a right of this nature did not require a service to vest it. Therefore, as the children here had a mere *jus actionis*, it was a moveable right, and descended to the heirs *in mobilibus*.

BURRELL
v.
BURRELL.
1825.

"Again, looking at the intention of the party, the deed declared that if William George Burrell shall die before he attains the age of twenty-five, 'the reversion of my estate and effects, above provided to him, shall be divided by my said trustees among my surviving children, equally among them, and their heirs and successors.' Here the heirs *in mobilibus* are appointed to succeed; and it was impossible to suppose that the maker of the deed intended the property to go to a different party upon the heir surviving the age of twenty-five. If anything can be gathered from the intention of the maker, it evidently is, that he conceived the reversion moveable."

LORD CRAIGIE observed,—“A trust-deed for family purposes is truly of the nature of a latter will, and ought to be governed, not strictly by the technical terms and expressions which may have been used, but by the probable intention of the truster, and the objects in view. Next to a proper administration of the funds, one great and leading object of such a deed is, to avoid the difficulty and expense of transferring the succession to the different parties favoured, in the various circumstances in which they might be placed. And, in general, it has been justly held that the parties are, in point of right, to be considered to be, at every period, in the same situation as if the conveyance had

BURRELL
v.
BURRELL.
1825.

been directly made to them. And it follows, from the same principle, that the legal succession, in the heritage and moveables which belonged to the truster, is not altered, unless this is expressly provided for, or necessarily to be inferred from the whole deed.

“ Where there is a positive injunction to sell, an undue delay on the part of the trustees will not be allowed to influence the rights of the parties. But here, though a power to sell is given, the exercise of it is entirely left to the discretion of the trustees. The special provision for an equal division of the whole funds, heritable and moveable, in the case of the eldest son predeceasing before the age of twenty-five, and the surrender of the heritable estate remaining in the hands of the trustees, in favour of George Burrell, the eldest son, after the objects of the settlement had been attained, prove that his right as heir was not to be limited, unless where the trustees, using their discretion, had accomplished a sale.

“ The words, too, in the fifth clause, ‘ upon satisfying these several claims,’ &c., do not import a condition that, until the whole debts and provisions were paid, the trustees might sell, or could be compelled to sell; otherwise if, at the distance of twenty or thirty years, a debt, or the smallest part of the provisions to the younger children, remained unpaid, the whole rights and interests of the parties might, without any authority or necessity, be essentially changed.

“ The interest which a party has, in virtue of a trust-deed, has been denominated a *jus crediti*; and so it has generally been held to be, as to the effect of legal diligence. And, in the case of a proprietor making a conveyance *ex facie* absolute to a trustee, upon obtaining a back-bond declaring the trust, it may be said that, in point of form, he has merely a *jus crediti*, and nothing else. Still, however, he is truly and substantially proprietor of the lands; and, upon his death, his eldest son has the same right in the lands, while his younger children are entitled to the rents received or un-uplifted; and he, and his representatives after his death, may bring an action of declarator for having their rights ascertained, and compelling the superiors to grant charters and precepts for infeftment. *Dalziel v. Henderson*, March 11, 1735. In this case, where the trustees never

took infestment, the heir-at-law might at this moment take up the lands by a service, or in virtue of a precept of *clare constat*; and, by obtaining an interdict against the trustees, his title would be as complete and indefeasible as if the trust-right had never existed; although to the prejudice of creditors or younger children no alteration could be made. Indeed, if the trustees were now to attempt a sale, it would not be because they thought it eligible or expedient for the purposes of the trust, but because in that way an alteration, not intended by the truster, might be made upon the succession to the funds."

BURRELL
v.
BURRELL.
1825.

LORD GILLIES observed,—“ I differ in every point from the opinion last expressed, except in this, that the will of the testator is to be viewed as the governing rule; and in endeavouring to find out what was his intention, it is necessary to look to what he has given to the heir. He had already given him the estate of Lyneton, with the heritable bonds affecting it; and he then devised and provided, in addition to this, the reversionary interest in the trust-estate. If the heir died before he attained the age of twenty-five, this reversionary interest was to go to his executors. This is expressed *in terminis*. Now, I am at a loss to perceive upon what principle Lord Craigie could discover that he gave this, or intended to give it, to a different series of heirs, if his son should survive twenty-five years of age. There is nothing in the terms of the deed to show this; and the circumstance appears to me a strong proof that the executors of the heir were the parties whom he intended to succeed upon his failure.

“ It is most important to observe, whether it was the intention of the maker of the deed that the property should be sold by the trustees or not. Now, the words used are, ‘ To the end and intent that my said trustees may, as soon after my death as with propriety can be done, and as to them may seem eligible and expedient, sell and dispose of my said whole estate and effects, heritable and moveable.’ I think that these words show that sale was an object of the deed; and I think it clearly demonstrated in the petition that this clause was imperative, and that the word ‘ may ’ there used, is to be viewed the same as ‘ shall.’ It was impossible that the trustees could be compelled to sell the property—they were under no penalty to do

BURRELL
v.
BURRELL.
1825.

so ; and could not be bound in any other way than by stating that the property was vested in them for that end and purpose. It is declared to be the intent of the deed that the whole property should be sold as soon after the granter's death as possible ; and as the whole might not be sold, and in order to prevent the trustees from doing so at a disadvantage, the next clause was introduced as to denuding of such part as should not be converted into cash, in favour of the heir, at the expiry of the trust. This, however, could make no difference upon the rights of the parties.

“ There is another strong argument well put in the petition, that the question is not to be decided by what the trustees did, but by what the testator intended they should do. Now, if the trustees had sold, would they have been bound to pay to the heir or executors of the deceased William George Burrell ? This question must be answered upon the same principle that must decide the present. It is nothing what the trustees have or have not done ; and, if the Court shall direct this property to be given to the heir, upon the very same principle, if it had been sold, they must have given the money to the heir in heritage, and not to the heirs *in mobilibus*. By enjoining sale, the testator clearly contemplated that his whole property might be converted into money, and plainly intended that it should descend as a moveable subject to those who were heirs *in mobilibus*.”

LORD PRESIDENT HOPE observed,—“ I am very clear on both points of the case. The deed gave a power of sale to the trustees ; but the granter contemplated that it might not be necessary to use it ; and then they were to denude in favour of the eldest son. He therefore contemplated that part of the property might not be sold, but would remain heritable, and descend accordingly. I agree with Lord Gillies in thinking that the case is to be decided, not by what the trustees did, but what it was intended they should do ; and, if they had sold unnecessarily, I am inclined to hold, upon the principle of the case of Annandale, that the sale would not have affected the succession. But this question is not before the Court ; and, therefore, I will not give a decided opinion upon it. I remember that, when the case of *Wilson v. Smart* was before the Court, in

the Second Division, they were all of opinion that, although property might be moveable in questions of diligence, it might be heritable *quoad* succession. I am, therefore, in favour of the interlocutor preferring the heir."

BURRELL
v.
BURRELL.
1825.

1. In the case of *CATHCART v. CATHCART*, May 26, 1830, a truster conveyed his whole estate, heritable and moveable, to trustees, "with power to uplift, receive, and discharge, sell, dispose of, and transfer the whole debts, means, estate, and effects hereby conveyed." After declaring the purposes of the trust, he directed, that "whatever residue or reversion shall then remain of my said means and estate, shall belong to the said Hugh Cathcart and his heirs, whom I hereby appoint my residuary legatees; and I direct my said trustees to dispone, assign, and pay over the same to him and his heirs accordingly." Hugh Cathcart predeceased his brother the truster. A sufficiency of personal property was left to pay all the debts and legacies, and leave a large reversion over. In consequence of this, the heritage was never sold. Hugh Cathcart left three sons and a daughter, and the question arose, Whether, under the terms of the trust-deed, the eldest son was entitled to claim the whole heritage for himself, or whether he could only claim a share of the mixed residuary estate, along with his brothers and sister?

2. The heir PLEADED,—That although the trustees were empowered to sell, which might have been necessary through some contingency, yet they were not directed to sell; and that from the large surplus of personal estate eventually left, it would have been an inexpedient act of administration had they sold any of the heritage. The terms of the deed were, that the whole residue "shall belong to Hugh Cathcart and his heirs;" and the trustees were directed "to dispone, assign, and pay over the same" to them. These words did not merely give a *jus actionis* against the trustees, but in effect declared, that as soon as the debts and legacies were paid, the remaining estate, *ipso facto*, belonged to and vested in Hugh Cathcart and his heirs, who could demand the *ipsa corpora* of the subjects composing the residue. Hugh Cathcart was the heir-at-law of the truster, and so soon as the debts and legacies were paid, the whole trust purposes were accomplished. The burden laid on his rights as heir-at-law, then *ipso facto* fell off. The residue, heritable or moveable, in terms of the trust-deed, belonged to him; and had he survived, he could have

served to the *hereditas jacens* of his brother the truster. The case of Durie is a ruling decision directly in point, and the case of Angus was essentially different, as in that case the trustees were enjoined to convert the whole estate into cash.

3. The younger children PLEADED,—The trust-deed contained a general power to sell, and, in the present question, that had the same effect as if there had been a direction to sell. The trustees could have paid the debts and legacies out of any part of the trust-estate. They could have done so by selling heritage for that purpose, and no one could have interpellated them from doing so. The right of the residuary legatee was a moveable right. It was nothing but a *jus actionis* against the trustees for such residue as might appear to be due by them, after satisfying the purposes of the trust. The whole interest of the residuary legatee was attachable by arrestment, and was therefore moveable as to succession.

4. LORD COREHOUSE, Ordinary, found,—“That although the late Mr. Cathcart’s trust-deed confers a power of sale on the trustees, it contains no direction to sell; that this power was given for the purpose of paying debts and legacies, but not for the purpose of dividing the residue, which, it is declared, shall belong, at the conclusion of the trust, to the truster’s heir-at-law; that, in the circumstances of the case, it was not necessary, expedient, or consistent with the exercise of sound discretion, for the

trustees to sell the heritage, and accordingly no part of it was sold. Therefore, preferred the claimant, Sir John Andrew Cathcart, to the subjects *in medio*, and decerned in the preference accordingly.”

5. In the case of FINNIE v. THE LORDS OF THE TREASURY, November 30, 1836, the truster conveyed his whole property to trustees, and gave them “the most full and unlimited powers to sell all or any part of my lands and estate, heritable or moveable, particularly and generally above conveyed.” The legacies left by the truster were more than sufficient to exhaust the whole moveable estate, and the trustees sold the heritage. The proceeds of the heritable and moveable estate exceeded £25,000; and after paying all the debts and legacies, there remained a residue of above £5000, which was unappropriated. The trustees raised a multiplepinding, and, in opposition to the Crown, claimed it, on the ground that as the trust-deed contained directions to sell the heritage, the whole estate of the deceased must be regarded as moveable, and that by the Act 1617, cap. 14, the trustees being executors nominate, were entitled to one-third of what remained after paying the truster’s debts.

6. LORD COREHOUSE, Ordinary, Repelled the claim of the trustees, and found them liable to account to the other competitors on behalf of the Crown. In the Note to his Interlocutor, Lord Corehouse observed,—“Had there been any thing to claim here properly falling under the description

of executry of the testator, there might have been room for the question raised on the part of the trustees, whether the right to call executors to account, declared by the Act 1617, cap. 14, was confined to the wife, children, and nearest of kin, or was available to the Crown, in cases like that which has occurred here? But it is unnecessary to enter into this, for it appears to the Lord Ordinary that the circumstances of the present case do not raise the question. In order to reach it, the trustees are obliged to assume, *First*, That the trust-deed was so framed as necessarily to render the whole heritage of the testator moveable in regard to succession; and, *Secondly*, That being so rendered moveable, it is held by them as executors, and with all the benefits attached to that character. The Lord Ordinary thinks that both of those assumptions are erroneous. It is true that cases may occur, and have occurred, in which a truster has so clearly expressed his intention that his heritable property should be converted into money, as to warrant the legal conclusion that it was to be treated as moveable in regard to succession. Such seems to have been one of the points which, among others, was decided in the case of *Dick v. Gillies*, 4th July 1828. But the present trust-deed is not of that kind; it is granted for purposes to be named in a separate deed, and it contains a power of sale, from its mode of expression, clearly discretionary, 'to sell all or any part of my lands or estate,' the effect

of which does not appear to be taken off by the parenthetical and superfluous expressions, 'who are hereby desired and required to exercise such powers.'

7. "The clause authorizing the calling up and discharging heritable or personal securities, is in the form of a power, and nothing else. There is no direction to convert his whole property into money; and what is of great importance, there is no appropriation of the residue leading to any implication that such a conversion was in the truster's view. No doubt he has, by his last will, left legacies, which will deeply encroach upon the heritable estate. But it does not appear to the Lord Ordinary that that circumstance can affect the character of the residue as regards succession. In substance, the present case appears exactly identical with that of a party conveying his land estate in trust, with a power of sale for the payment of certain legacies set down in the trust-deed, without any farther direction; a settlement which, though of course creating moveable rights in favour of the legatees, would leave the residue heritable in regard to the heir; and certainly would not, without some farther and very strong indication of the testator's intention, let in his next of kin.

8. "In short, the Lord Ordinary thinks that if the present competition had arisen for the residue between the heir of the testator and his next of kin, it must have been determined in favour of the former. But, 2dly, and even on the supposition that the effect of the trust-

deed was necessarily to convert the testator's heritage into moveables, so as to render it descendible to his next of kin in preference to his heir, it does by no means follow that it would render it executry in the only sense in which it could benefit the trustees. Giving them the full benefit of their construction of the Act 1617, their rights as executors cannot extend beyond that which they took in that character, viz., the proper moveable succession as it stood at the death of the testator. In so far as regards the price of his heritage sold in obedience to his directions, they are not executors but trustees, a character necessarily implying responsibility and the gratuitous discharge of their duty, and which never did, either at common law or under the Act 1617, confer any beneficial interest whatever in the subject of the trust."

9. In the case of *PATRICK v. NICHOL*, December 7, 1838, a truster conveyed his whole property, heritable and moveable, to trustees, with full power to sell and dispose of the estate, and generally with power to do and execute everything necessary for settling, transacting, disposing of, or rendering effectual, and turning the estate into cash. The second purpose of the trust was,—that the trustees should invest and secure the residue of the truster's means and effects, on good heritable and personal security, and that they should hold the sums so vested and secured for behoof of John Ralston and Mary Ralston or Nichol, the son and daughter

of the truster; whom failing, to Adam Nichol, son, and Margaret Nichol, daughter of the said Mary Ralston; whom failing, for behoof of the truster's own nearest heirs whatsoever. The trust-deed declared that the foresaid sums, and the interest thereof, should be paid to the parties named, only to such extent and at such times as the trustees should think proper; and farther declared, that after the decease of the parties named in the deed, the trustees should convey or pay over the residue which should remain in their hands to the truster's own nearest heirs whatsoever. John Ralston the son died unmarried, Mary Ralston the daughter survived her children Adam and Margaret Nichol. Adam left one child, Mary Nichol, and his sister Margaret left six children. On the death of Mary Ralston their grandmother, the question arose, Whether the residue of the trust-estate, which was heritable, was to be held as moveable estate, and divisible among the next of kin of the truster, under the destination to heirs whatsoever? In order to settle the rights of parties, a multipointing was brought by the trustees. Mary Nichol, the only daughter of the truster's grandson, claimed to be preferred to the whole heritable estate; and the six children of Margaret Nichol, the truster's granddaughter, claimed to be preferred as heirs *in mobilibus* to six-seventh parts of the residue of the trust-estate.

10. *LORD MONCREIFF*, Ordinary, "Sustained the claim of

Mary Nichol the heir-at-law, and preferred her accordingly;" and the Court adhered. In the Note to his Interlocutor, Lord Moncreiff observed,—“There is considerable nicety in this case. But the Lord Ordinary thinks that it must be decided in favour of the heir, on the principles of the cases of *Durie v. Coutts*, November 30, 1791; *Burrell*, December 14, 1825; *Cathcart*, May 26, 1830; and *Ramsay v. White*, June 26, 1833. The trust-deed gives a power to the trustees to sell the existing heritable estate, and to invest the residue in heritable or personal security. But there is no imperative direction that they shall sell the property. Then it provides that they shall hold the sums so invested for behoof of John Ralston and Mary Ralston; whom failing, of Adam Nichol and Margaret Nichol, the son and daughter of Mary Ralston; whom failing, for behoof of ‘*my own nearest heirs whatsoever*.’ There is a very broad and extraordinary discretion given to the trustees in regard to the holding and application of this estate. For although they are to hold it for the behoof first of the Ralstons, and then of the Nichols, it is expressly provided that these parties shall have no right, either jointly or separately, to demand the same or any part thereof; and that it shall rest entirely in the discretion of the trustees to what extent, in what shares or portions, and at what times, any payments from the sums invested, or the interests and profits thereof, should be made to them. And then the deed final-

ly provides, ‘That upon the *decease* of the said John Ralston and Mary Ralston, and Adam Nichol and Margaret Nichol, the said trustees or trustee shall convey or pay over the said sums and interest thereof, or such portions thereof as may remain in their hands, to my own nearest heirs whatsoever.’

11. “The case which has occurred is, that the testator died on the 2d April 1832, and that John Ralston died on the 4th August 1832; that Mary Ralston had two children mentioned in the settlement, — Adam Nichol, who died in April 1836, leaving a daughter, the claimant, Mary Nichol, — and Margaret Nichol or Patrick, who died in January 1833, leaving a number of children, who are the other claimants; and that, finally, Mary Ralston herself died on the 22d June 1836. Thus the succession opens to the *heirs whatsoever of the truster*. In this state of the family, the subject of succession is *all heritable*. The trustees have not exercised the power of selling it. They had other funds sufficient to pay the debts of the testator, and they seem to have paid the rents and profits of the remaining estate to Mary Ralston till her death. The question is, whether the *heritable estate* thus held by the trustees can be considered as a *moveable estate*, divisible among the next of kin of the deceased, under the destination to his *heirs whatsoever*.

12. “The difficulty of the case lies in this point, that in the appointment of the purposes of the trust and the destination, though the

testator had only given a power to sell, without any injunction or direction to that effect, he does seem to assume that a sale might have taken place, and it is the sums to be invested which are to be held for the benefit of the Ralstons and the Nichols, and on their decease to be conveyed or paid over to his own heirs whatsoever. But when the Lord Ordinary considers that there was nothing but a power of sale given, and of course a *power* of investment only, if a sale were made; that the discretion given to the trustees during the lives of the two Ralstons and the two Nichols was so unlimited that it could not be said that any distribution of capital was appointed, and that no one could be *in titulo* to require them to sell the property; that even if they did sell and invest, they were entitled to invest on *heritable* security; that the final appointment is, that they shall *convey* or pay over the sums invested, or such portion thereof as should remain—and this to the heirs whatsoever of the granter, without mention of *executors*; he finds it very difficult to suppose that the testator did not contemplate the case of a conveyance of heritable property to the proper heir. And if the trustees, without violating any obligation laid on them by the trust-deed, had *power* to hold the estate in the heritable condition in which it was left, the import of the settlement seems to be, that that estate must descend to the heir whatsoever of the deceased, according to the ordinary rules of law. For there is no provision

that *after the decease* of the Ralstons and Nichols, the trustees shall sell the property and distribute the price among the testator's *executors* or *next of kin*. The Lord Ordinary doubts much whether they have any power to sell now; for their power to sell was only for the purpose of investment of a residue. But that is at an end now, and on every construction nothing remains but that they shall *convey* or pay over what remains in their hands to the heirs whatsoever of the deceased. Indeed, any other view would lead to this conclusion, that because they have not exercised the power of sale, the estate in their hand is not destined at all, but must fall to the heir-at-law.

13. "In all the cases above referred to, there was a *power* to sell or uplift what was heritable and convert it into money, or a moveable state. In some of them it was a question whether the power was for the purpose of *distribution*, or in contemplation of the necessity of its being exercised for payment of debts and legacies. But, in all of them, it rested in the discretion of the trustees to sell or not; and, if they had sold, the distribution must have been as of personal estate; and in some, the testator had evidently contemplated that a sale would take place, at least as certainly as he can be said to have done so in the present case. But this case is very peculiar. The discretion given to the trustees is so very strong, that the interests of the Ralstons and Nichols might be, as they actually were, reduced

to a mere liferent; and even that, not as matter of legal right. There was strictly no legal title as against the trustees given to any one, but the heirs whatsoever of the testator. The Court might perhaps have interfered in equity, if the trustees had refused to account for the annual profits or proceeds of the estate to the Ralstons during the life of Mary Ralston; but if they did so, the Lord Ordinary conceives that they could not by any equitable construction have gone farther. And, therefore, although they may have held the heritable estate in some sense for the behoof of these parties, subject to their own discretion, they held it truly, as the case stands, for the heirs whatsoever.

14. "The case of Angus, December 6, 1825, is the strongest in favour of the other construction, and

certainly deserves attention. But it appears to the Lord Ordinary, that the intention was so clearly evinced in that case, that it was impossible to come to any other conclusion than that adopted. Though in words, there was only a power to sell the property and convert it into cash, the positive appointment, as soon as the debts and legacies should be paid, to *divide* the residue into *four shares*, and immediately to invest one of the shares, and pay over the others, in the peculiar terms laid down, really did necessarily import an injunction to administer the trust, by a sale of the heritable property, in the first place; and the *jus crediti* given to all or any of the parties interested, was plainly a right to require a distribution on that principle."

Where Land is conveyed to Trustees by a Debtor for behoof of his Creditors generally, the accession of his personal Creditors will not alter the character of their debts from moveable to heritable.

I.—CAVE'S CREDITORS v. MURRAY.

IN 1727, Andrew Marjoribanks conveyed a portion of his heritable estate to trustees, sufficient to pay all his debts. John Murray of Uplaw, was one of his creditors, and his name was mentioned in the trust-disposition. The trustees were infeft on the conveyance. In 1730, Mr. Murray assigned his debt in favour of Joseph Cave. He afterwards became a creditor of Cave, and arrested in the hands of Marjoribanks as debtor to Cave. The affairs of Cave having become embarrassed, the

Jan. 21, 1736.

NARRATIVE.

CAVE'S
CREDITORS
v.
MURRAY.
1786.

trustee for his creditors objected to Murray's claim founded on his arrestment, on the ground, *First*, that Murray had arrested in the hands of the common debtor, instead of his trustees; and, *Second*, on the ground that the debt due by the common debtor had become heritable by the conveyance by the common debtor in favour of his creditors, and that, therefore, the diligence by arrestment was inept. Murray denied that he had ever acceded to the trust-deed.

Interlocutor of
Lord Ordinary.

The Lord Ordinary preferred the Arrestee.

JUDGMENT.
Jan. 21, 1786.

The Trustee for Cave's creditors having Reclaimed, the Court "Adhered."

OPINIONS.
MS. Notes,
Kilkerran's
Session Papers.

On the Session Papers in the case, LORD KILKERRAN has written,—“ This should be seen, for I see not on what ground the Lord Ordinary has found that an arrestment can affect a sum become real by an infestment granted in security of it.”

MS. Notes.

LORD KILKERRAN again writes,—“ Now that the answer is come in, the only question is, Whether Murray had ever acceded to that right by Marjoribanks to trustees for behoof of his creditors, on which infestment followed, and which is the infestment whereby the petitioner affirms the debt due to Murray by Marjoribanks to have become real? So in effect it comes to be a question of fact, unless it be supposed that the right was such as none of the creditors of Marjoribanks could repudiate.”

MS. Notes.

After the judgment of the Court, LORD KILKERRAN again writes,—“ Adhered, and in the reasoning, the Lords were of opinion that such trust-rights, for behoof of creditors in general, did not alter the nature of the several debts due to the creditors, and was not at all like the case of an heritable security given to one heritable creditor.”

Elchies' Deci-
sions, Heritable
and Moveable.

LORD ELCHIES, in his Decisions, observes,—“ Moveable bond not rendered heritable by the debtor's disposing lands to his creditors for payment of his debts, and particularly of that bond, on which disposition and infestment followed, but the debt found to remain still moveable and arrestable.—N.B. The creditor had not here acceded to the trust-right. But the Lords were of the same opinion, even though he had acceded.”

II.—HAWKINS *v.* HAWKINS.

In 1772, George Dempster of Dunnichen conveyed his heritable estate to trustees for “the satisfaction and security” of his creditors; and in order that the estate might be properly managed, and the rents more regularly applied to the discharge of public burdens, and the interest of the truster’s debts.

May 23, 1843.
NARRATIVE.

Power was given to the trustees, not only to manage the lands and levy the rents, but also to sell the estate, if they should think proper, the price to be applied in paying off debts. The special purposes of the trust were to pay the interest of the debts, real or personal, specified in a list engrossed in the deed, and likewise to discharge the interest of certain family provisions. The residue was to be applied for the truster’s behoof.

The trust was declared irrevocable till its whole purposes should be accomplished, particularly until the whole debts contracted by the truster prior thereto, should be paid. The trust-deed also declared, that, “in the meantime, this present right, with the infestment to follow thereon, shall subsist as a security to my said creditors, agreeable to the true intent and meaning thereof.”

In 1800 and 1807, Mr. Dempster executed supplementary trust-deeds in favour of additional trustees, of the same nature and import, but containing certain clauses which were not in the original deed. In particular, in the deed of 1800, power was given to the trustees in the following terms:—“And further, in the event of any of my creditors hereinafter named demanding payment of the principal sums due to them, or of my said trustees or their aforesaid finding it expedient to pay off any of my creditors after named, or in the event of it becoming necessary from any cause at present unforeseen to borrow more money upon my account, then and in all or any of these cases, with power to the said trustees or their aforesaid to borrow the sum necessary for the purposes aforesaid, and to charge the same as a debt and encumbrance upon my lands and estates herein before disposed.” The deed of 1807 contained a similar provision.

In the deed of 1800, after the enumeration of the debts, the

HAWKINS
v.
HAWKINS.
1848.

following declaration occurred :—" All which debts due by me as aforesaid are hereby expressly declared to be real burdens upon, and affecting this present trust-right, and infestments to follow hereupon, which shall subsist and continue as a security to all my said creditors, until the sums due to them respectively as aforesaid be fully paid and discharged."

In 1830, William Rait acquired right by progress to six several personal bonds, granted by Mr. Dempster, the truster, with consent of his trustees, of various dates between 1782 and 1801, the contents of which amounted in all to £3143. In each of these bonds it was declared that the debt thereby due should equally affect and be secured upon the subject of the trust, as any other debt with which the said trust-disposition was burdened. They had, however, been always dealt with as personal, having all of them been passed through several hands by assignation, and those which had passed to representatives had been taken up by means of confirmation. In the second trust-disposition executed by Mr. Dempster, and instrument of sasine following thereon, George Blair, Dundee, was declared to be a creditor to the amount of £2400, being the contents of five of these bonds to which Mr. Blair then had right. The amount of the sixth bond was specified, in a list of debts referred to in the third trust-disposition, as a debt due to Charles Binny, the original creditor therein.

In 1833, Mr. Dempster's trustees granted to Mr. Rait a bond of corroboration of the six bonds to which he had acquired right, declaring that " the said six bonds, and whole sums of money, principal, interest, and penalties therein contained, should equally affect and be secured upon the lands and others disposed in trust to them by Mr. Dempster, as any other debts with which the trust-disposition executed by him was burdened."

The whole debt was subsequently acquired by James Whitehead Hawkins, Esq., advocate, by deed of assignation and translation from Rait, which narrated the bond of corroboration from the trustees, and the above declaration therein contained.

Mr. Hawkins having died intestate in 1841, leaving a son and four daughters, the question arose, Whether the debt was heritable or moveable as to succession? Dempster's trustees brought a process of multiplepinding, calling both the heir and the executors.

PLEADED FOR THE HEIR.—The object of the trust-disposition was to afford a security to the creditors whose debts were enumerated. These creditors having acceded to the trust, the character of their debts was changed to heritable. By their accession to the trust, the trustees accepted of an heritable security for their debts. The infestment of the trustees became the infestment of the creditors; and in a question of succession, the intention of the ancestor alone was to be looked to, whether the question was as to who was bound to pay, or who was entitled to receive. At all events, the £2400 of the debt which was narrated in the body of the second trust-deed, and also in the infestment following thereon, was heritably secured, and descended to heirs.

HAWKINS
v.
HAWKINS.
1848.

ARGUMENT FOR
HEIR.

PLEADED FOR THE EXECUTOR.—The trust-dispositions gave the creditors no real security over the lands conveyed, but merely a right to call the trustees to account. There was no indication of intention on the part of the creditors to change the character of the debts to heritable, and they therefore retained their original character of moveable.

ARGUMENT FOR
EXECUTOR.

LORD CUNINGHAME, Ordinary, Found,—“That in a question between the heir and executor of the creditors holding the bonds libelled on, the same must be viewed as moveable, and to descend to the executors of the creditors: Therefore prefers Misses Hawkins to the fund *in medio*, and decerns.”

Interlocutor of
Lord Ordinary.

In a Note to his Interlocutor, LORD CUNINGHAME observed,—“Although no precedent exactly parallel with the present, in its circumstances, is to be found on record, the tendency of all the later cases appears to be, to hold that claims which are moveable on the face of the voucher constituting them, are not rendered heritable by trust-deeds conveying heritable estates to trustees for security of the creditors and other purposes, when the creditors have no direct access themselves to the trust-estate, but must proceed by actions of accounting and other compulsiors against the trustees.—See the cases of Grierson and Ramsay. Wilson, 31st May 1809, and Angus, 6th December 1825.

Note of Lord
Ordinary.

“Hence, the general doctrine of Mr. Erskine, B. II. tit. 2, sect. 15, that even a trust-deed created for behoof of creditors, converts a moveable into an heritable debt, requires some cor-

HAWKINS
v.
HAWKINS.
1843.

rection, unless he is understood as adverting to the case of a specific trust granted solely for behoof of an individual creditor, which would not apply to general trusts, such as that now under consideration. Mr. Erskine's general doctrine is properly qualified by Mr. Ivory in his note on the passage, as well as by Mr. More, in his dissertation annexed to his edition of Stair.

"On a fair application of the rules and principles established by these authorities to the present case, it is not thought the bonds here can be viewed as heritable securities in the persons of the creditors."

JUDGMENT.
May 23, 1843.
OPINIONS.

The Heir having Reclaimed, the Court "Adhered."

LORD PRESIDENT BOYLE observed,—“I have seen no sufficient grounds for adopting a different conclusion from that of the Lord Ordinary. I can see no sufficient evidence that the fund in *medio* in this multiplepinding has been made a real burden on the lands embraced by the trust-deeds of Mr. Dempster. The debts enumerated are, no doubt, declared burdens on the trust-deeds, and an obligation in favour of the creditors in them was thereby imposed on the trustees to pay and discharge their debts out of the lands, or their proceeds, in the event of a sale. But this appears to me far short of a creation of a real burden or lien over the lands themselves. I therefore do not consider that the effect of the trust-deeds was to make the debts, which were contracts only under personal bonds, heritable, so as to regulate the succession to them.

“The solitary case of *Murray Kynnynmound*, Nov. 6, 1739, M. 5590, even if its authority were to have the full effect deduced from it by Mr. Erskine in the passage that has been referred to, cannot regulate this particular case, the creditors' assent to the trust evidently being indicative of no intention whatever to regulate the succession to the debts referred to in it. But it is hardly possible to doubt, that the weight of the authority of that case of *Murray* is diminished by the decisions referred to in Lord Ivory's note on Erskine, where its soundness is called in question, and a different principle adopted. It is reported with unusual brevity by Lord Kilkerran.

“It is also an important feature in the present case, that the bonds in question have generally been treated and dealt with

as moveable. On the whole, therefore, I am for adhering to the Lord Ordinary's interlocutor."

LORD MACKENZIE observed,—“ I have a deal of difficulty. There are some decisions which seem to bear one way and others another ; but, upon the whole, I think the principle of the cases is adverse to the opinion of the Lord Ordinary. The grand rule is, that debts really secured on land are heritable. The question then comes to be, whether the debt here is not really secured on land. It appears to me that it is, in the most effectual way. There is here a conveyance of land in trust for security and payment of the debt. The trustee is infest, and his infestment is irrevocable. The conveyance was communicated to, and approved of, and accepted by, the creditor.

“ I think it must be held that the trustee is trustee for the creditor as well as the debtor—i.e., he holds the property in trust for the creditor's security, or the creditor by his trust holds it in security. The trustee was not a mere agent of the debtor. That being the case, there was a real security constituted on the land in favour of the creditor, as much as if he held it directly himself. It is said the creditor's right is merely personal against the trustee. But in that case he would have no preference against the creditors of the trustee, whom he wholly excludes. He has a right to call the trustee to account, but that is because he holds the lands for him as his trustee ; and it is as such he calls him to account, which is perfectly consistent with his real right, and indeed is essentially founded on it.

“ But it is said that the creditor never consented to change his debt from moveable to heritable, so as to affect his succession. But he consented to accept of real security on land, which inevitably makes a moveable right heritable. It is not necessary that the intention should be declared. Of this the case of Kidd affords a striking instance, where a direction was sent from India to invest money, and after the investment, it was held that it could not be carried by will. It may be otherwise where a trust for creditors is not accepted by them ; but that is not the present case. Here, if the creditor accepted an heritable security for a moveable debt, he changed its character by that act. He might have made it go to heirs *in mobilibus* by a

HAWKINS
v.
HAWKINS.
1843.

HAWKINS
v.
HAWKINS.
1843.

special destination ; but if he did not do that, it wont do to say that they are entitled to it, because there is no express indication of intention on his part to change its character. The Lord Ordinary seems to say that the case would be different were a trust created in favour of one creditor. It does not appear to me that the number can make any distinction. I think in the case of many, as well as in the case of one, the creditors acquire a real right of a peculiar nature, being through the instrumentality of a trustee.

“In fine, I may remark, that when the constitution of a real right on the land by such a trust is denied, it is nowise explained how else the creditor has thereby a preference over the creditors of the trustee, and over the other creditors of the truster, for whose security and payment the trust is not granted. Yet that such preference is created has never been doubted. This reasoning is supported by the opinion of Erskine, and the decisions alleged against it seem to rest on no clear principle, and not to be strictly applicable. They are chiefly decisions, that the claim of a creditor so secured against his trustee may be affected by arrestment—a rule that may rest on other views than holding the debt as between heir and executor not to be heritable.”

LORD FULLERTON observed,—“This is a case of some nicety, resting on a distinction of a very delicate kind. I am of the opinion expressed by the chair, that the debt is moveable, and must go to executors. With regard to the £2400, the debt in the person of Mr. Blair, there is a provision that it shall form a burden on the trust-estate. With regard to the other sum, which was not mentioned in the trust-deed, but was contained in a list of debts subjoined, there might, in a question of competition, be a little more difficulty as to a claim of preference. But that does not occur here. Take the bond expressly mentioned in the second trust-deed. The debts are declared to be real burdens on the trust—on the right conveyed to the trustee, but not on the lands. I think it quite clear that they are just declared to be properly specified burdens on the trust-deed. In order to support a trust-deed even for creditors, it is necessary that there should be a specification of debts.

“The question comes to this—Whether, in a trust for pay-

ment of debts, the separate debts, though constituted by moveable bonds, are, by the trust, heritably secured? One point is plain, viz., that where a creditor acquires a specific real right, his debt becomes heritable. In one sense, it may be said that a creditor who gets a security through a trust-deed, stands in the same situation; but a conveyance of land to a trustee, for behoof even of specified creditors, is neither in form nor in substance the same as a real right being made over to them. In the first place, even in form, no specific real right is created in favour of any one of the creditors. All that the trustee is bound to do, is to apply the estate in payment of their debts. If the estate is sold by the trustee under the power of sale, what becomes of the creditor's real right? If they had a real burden, it would remain till their debts were paid; but here they would have only a claim on the price.

HAWKINS
v.
HAWKINS.
1843.

"It is on this that I do not exactly agree with the Lord Ordinary as to a trust for one creditor. I think it would leave his debt just as it was. I can conceive a trust that would change its character—as, for instance, a security granted in trust for behoof of the creditor, which, though in the hands of a trustee, might be taken out of his hands by the creditor for whose behoof he acted. No creditor could take the real right out of the trustee's hand, under a general trust-deed for payment of debts.

"The decisions bring out this distinction. Thus, in the case of Ramsay and Grierson, it seems to have been held, that where the right of a party resolved into a mere *jus crediti*, or right to call the trustee to account, it made the right moveable so as to go to executors. In the case of Durie and Coutts, on the other hand, the Court held that a specific real right had been constituted in the trustees for the benefit of an individual, and that therefore it remained a real right. The distinction I allude to was thus recognised, though it must be confessed that neither class of cases bring it out very clearly. In the case of Angus, Dec. 6, 1823, the Court first considered whether the right of the parties was a right to a specific heritable subject, or a mere right to call the trustees to account for moveable funds, and being of opinion that it was the latter, they held it moveable as to succession. Lord Pitmilley's opinion in that case shows the

HAWKINS
v.
HAWKINS.
1848.

distinction plainly. The same distinction was again taken in the case of Burrell. The principle of these cases goes far to decide the present. In all of them, there was before the sale of the estate just such a security as the present. The creditors have had no *jus crediti* to demand from the trustees any specific heritable subject whatever. Their right is merely to demand from them payment of their debts. On the principle of the decisions I have referred to, we must treat the debts as moveable as to succession. On the whole, therefore, I agree with the Lord Ordinary."

LORD JEFFREY observed,—“ I am of the opinion last delivered, and on the same grounds. This is a question of succession, in which the intention and view of the party is primarily to be looked to ; but as everything was done that was contemplated to be done, all the analogy of those cases fails, in which, where a party contemplated a security, though he failed in the execution of his intention, it was held, that, though the rule is different in a question of competition, in a question of succession intention is to be given effect to. Here the question comes at once to be, whether an heritable right was in reality constituted in favour of the creditors. I agree with Lord Mackenzie, that where a party directly takes an heritable security, it requires no indication of intention on his part to make it go to his heir, and that the mere circumstance of the party not being cognizant of the effect of what he does, will not be of any consequence in a question as to his succession.

“ Looking to the whole trust-deeds, it appears to me plain that the purpose was not to give an heritable interest in the estate to each of the creditors whose debts are enumerated. The mere enumeration of them will not alter their nature. The right given to each creditor was merely to call the trustee to account, and to demand from him payment of a personal bond. The whole question is solved on principle, and by technical rules, by supposing that any of the creditors had demanded from the trustee payment of his bond or security over the estate, and that security had been given and infestment taken—Would that creditor not have been preferable to the others who had no such security ?

“ I am not moved by the observation of Lord Mackenzie with

regard to the clause in the Lord Ordinary's Note, as to the distinction between a general trust and one for behoof of a single creditor. He does not mean that the oneness of the debt would vary the matter. He contemplates a trust granted as a security for a prior debt, not on the narrative of a general settlement, but of a wish to grant an heritable security to a particular creditor. I look upon the present trust as only a transference of the real right in the truster to the trustees, who stand very much in his situation, and who are bound, as he would have been, to pay the debts enumerated. Lord Mackenzie thinks there was no personal obligation imposed on the trustees; but if they were to pay out funds contrary to the direction of the truster, I think they would be liable for any defalcation—and that is the nature of the creditor's right—to compel the trustees to apply the estate to the payment of their debts. They have the security of his infestment, and his obligation to execute the trust."

HAWKINS
v.
HAWKINS.
1848.

1. In the case of **MURRAY KYNNYNMOUND v. CATHCART**, Nov. 6, 1739, it was held that a conveyance by a debtor of his heritable estate to trustees for behoof of his creditors, rendered the debts heritable. In this case, however, the creditors had assigned their debts to the trustees, and adjudications had been led upon them. On this case, **LORD KILKERRAN**, in his Decisions, observes,—“Where a disposition of heritable subjects was granted by a debtor to trustees for behoof of his creditors, and acceded to by the creditors, and thereafter a part of the subject sold by the trustees for the creditor's payment, in a question between the heir and executor of one of the creditors, the

whole debt was found to be thereby rendered heritable, and to remain so at the creditor's death, except in so far as the creditor was entitled to draw of the sums therein contained out of such of the subjects as were sold by the trustees before his death; for in so far the bond was found to become again moveable, and to belong to the executors.”—*Kilkerran*, p. 243.

2. In the case of **DUNBAR v. THE EXECUTORS OF BRODIE**, July 13, 1748, a similar judgment was pronounced. In this case, the creditors assigned their debts to trustees, and one adjudication was led for the whole debts due to the several acceding creditors. **LORD KILKERRAN**, in his Decisions, observes,—“While part of

the price of the subjects sold was yet unpaid, and other subjects remained unsold, Mr. William Brodie died, and a competition ensuing between Sir William Dunbar his heir, and the Lady Dipple his executor, each claiming the whole of the debt remaining due to him, the trustees brought a multiple-poining, wherein the Lords 'Preferred the executors to the defunct's interest, in the price of the subjects sold before Mr. Brodie's death, and yet resting unpaid, and preferred the heir upon the subjects that were unsold at his death.'

3. "As this decision was agreeable to a former precedent, *Murray Kynnymound v. Cathcart and Rothead*, so it was in itself just. As to what was argued for the heir with regard to the subjects sold, that notwithstanding the sale of a subject adjudged, the debt stood secured by the adjudication, as nothing but payment can extinguish an adjudication, which is a settled point in judicial sales, the answer was, that judicial sales proceed without consent of the creditor, whose security, therefore, it would be unjust in the law to loose till the creditor should obtain payment, which does not apply to the case of a voluntary sale. And as to what was argued for the executor, with regard to the subjects unsold, that the trust-right, even when acceded to by the creditors, was by the express tenor of it only intended to facilitate their payment by a sale of the subjects, which could not infer a purpose to alter the nature of their security; and that neither

did the adjudication alter the case, as the conveyance of the debts whereon it proceeded expressly bore, that the same had only been intended to make up a sufficient right to the person who should be purchaser of the lands, and for the better enabling the trustees to uplift the debts and other subjects conveyed to them, if argument of that kind were hearkened to, neither trust-rights nor adjudications would ever render debts heritable. However the intention of such rights may have been expressed by the creditors, it could not be thence inferred, that the creditors could not use them to other purposes." — *Kilkerran*, p. 246.

4. In the case of *M'Ewan v. Thomson*, June 18, 1793, a debtor having been incarcerated for debt, was liberated upon granting an obligation to execute a trust-deed conveying his whole estate, real and personal, in favour of his creditors. A trust-deed was accordingly granted. It stated, the farther security of his creditors, and the more ready payment of their debts as its inductive cause; and the trustees were authorized by it to sell the lands, and to take every necessary step for effectually securing the creditors, and obtaining them payment of their debts. The trustees took infestment. A creditor who had acceded to the trust died without issue before the property was sold. In a question between his heir-at-law and his widow, the former contended that the debts of acceding creditors were made heritable by the trust.

The Lord Ordinary found, that the debt continued moveable, and the Court adhered.

5. LORD JUSTICE-CLERK BRAXFIELD observed,—“The debt neither was made, nor was intended to be a real burden. It was a mere trust to sell, and pay creditors out of the price.” LORD PRESIDENT CAMPBELL observed,—“The trust neither made the debts real nor heritable. It was a trust to convert into money, and pay the debt. If the deed in the case reported by Kilkerran was of the same nature, it was a wrong decision.” — *MS. Notes, Baron*

Hume's Session Papers. LORD PRESIDENT CAMPBELL has written,—“Heritable and moveable. The trust-right here was merely for management, and not for security. It contains no clauses which could have the effect to make the debts either real or heritable. The precise nature of the trust in the case of Murray Kynnymound, observed by Kilkerran, is not explained. The principles laid down in the case of Grierson are more accurate. Erskine does not sufficiently distinguish.”—*MS. Notes, Sir Ilay Campbell's Session Papers.*

SECTION XII.

NOMINATION OF HEIRS.

A Nomination of Heirs is Valid if supported by a Relative Deed of Conveyance.

I.—KENNEDY *v.* ARBUTHNOT.

July 13, 1722.

NARRATIVE.

HUGH KENNEDY of Baltersan disposed his estate to his only son John, and the heirs of his body, whom failing, to *blank*; and the disposition appeared to have been signed with a *blank* as to the substitutes. Subjoined to the subscription of parties there was the following docquet :—" I, Hugh Kennedy of Baltersan, do hereby declare, that I give power and warrant to William Fergusson of Auchinblain, to insert the names of John Kennedy, younger of Culzean, and his heirs; and failing him, to Sir Archibald Kennedy of Culzean, and his heirs, in the above disposition. I have subscribed thir presents at Baltersan, the 17th day of February 1701, before these witnesses, Mr. Alexander Fairweather, minister at Mayboll, and the said William Fergusson, writer hereof. Hew Kennedy. Alexander Fairweather, witness. William Fergusson, witness."

The disposition was afterwards filled up as to the substitution in pursuance of the order contained in the docquet. The son, John Kennedy, having died without issue, and without having made up a title, a competition ensued between the defender, Hugh Arbuthnot, who was the heir of line of the granter of the disposition, and Sir John Kennedy.

ARGUMENT FOR
HEIR-AT-LAW.

PLEADED FOR THE HEIR-AT-LAW.—Although the disposition appears at present to bear a substitution to Sir John Kennedy,

yet the substitution was originally left blank, and continued so after the subscription of the granter of the disposition. The deed is therefore absolutely void in terms of the Act of Parliament 1696. That Statute is express in requiring that all deeds originally conceived blank in the receiver's name shall be filled up either before, or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery, and certifying that all writs otherwise subscribed and delivered blank, as said is, shall be declared null. The law has thus fixed a method by which alone deeds blank at the time of subscription can afterwards be effectually filled.

KENNEDY
v.
ARRBUTHNOT.
1722.

The plea that a docquet subsisted as a nomination, even although the disposition were void, and that in virtue of it Sir John could compel the granter's heir of line to denude in his favour, cannot be sustained. It proceeds on the supposition that the principal disposition is void. But nothing can be more certain than that a substitution, which takes all its force from the institution, and from the formal words of the grant, must be ineffectual if the grant itself is void. Giving the docquet its utmost force, it can have no greater effect than to show that the granter intended that Sir John should be substituted to his own son in the disposition formerly made by him.

It is not, however, every declaration of intention that constitutes a right of transmission, else there would soon be an end of the settled forms and solemnities of law. In constituting rights and conveyances, the regular legal, dispositive, or obligatory words, must be used before a person can be deemed to convey or bind himself; and therefore, though one's intention do appear, if it is not expressed in proper words to convey or oblige, it has no legal effect, and it would be of very dangerous consequence to give any colour to the alterations of style by which heritage is ordinarily conveyed. A missive letter of a defunct, declaring his intention to dispoise his estate to a third party, in prejudice of his heir, would neither be good as a disposition, nor import an obligation upon the legal heir to denude.

The docquet cannot import a disposition of the heritage to the person therein named, because there is not one word disposing the same to him, nor even a word naming him a substitute. The docquet only gives power to another to insert the

KENNEDY
v.
ARBUTHNOT.
1722.

name of Sir John Kennedy, younger of Culzean, &c., in the disposition. If this is to be held a conveyance of property, it is difficult to see why a missive letter of a defunct, declaring his intention to dispoise his estate to a third party, may not import a disposition or an obligation on the heir-at-law to denude.

The present case is quite different from the case of a person granting a disposition in favour of a certain heir named, and of such other persons as the disponent shall think fit to name by any writ under his hands before his decease. For if a nomination of heirs appear under the hand of the disponent, the reference made by the disposition to it makes a good substitution of heirs, and such nomination becomes a part of the disposition, at least if the nomination was not made on deathbed.

ARGUMENT FOR
SUBSTITUTE.

PLEADED FOR THE SUBSTITUTE.—The present case does not fall under the Act 1696 anent blank bonds. That Act only relates to writs where the blank filled up is not supported by any written deed of the granter, but stands singly upon the footing of being filled up above the subscription and the writ. The Act, however, has no relation to a blank filled up by order in writing of the granter himself, where the names of the person to be filled up is expressly mentioned in the written order, and that order is signed before witnesses in the most solemn manner. It is of no import that the filler up of the blank is not mentioned or designed in the body of the disposition. This is sufficiently supplied by the written order under the granter's hand; for that order being lawfully made out, having the writer's name and witnesses, it is not material who filled up the blank, the truth of the granter's consent being sufficiently verified by the writer and the witnesses of the order.

But even if the disposition were blank to this day, Sir John would be entitled to succeed under it. The disposition being to the son of the granter, whom failing, to *blank*, and an order being annexed, signed by the granter of the disposition, appointing Sir John's name to be filled up in the blank as substitute, this is a nomination of Sir John to be substitute, and a legal declaration of the granter's intention that he should be so. A nomination of a substitute in a paper apart, where the substitution is blank in the original disposition, is just as valid

and effectual as if the name of the substitute had been filled up originally in the blank and before subscribing.

KENNEDY
C.
ARBUTHNOT.
1722.

The order or docquet annexed to the disposition signed before witnesses, ordering Sir John's name to be filled up in the blank as substitute, is a nomination of him to be substitute, and gives Sir John right to the subject now upon the failure of the institute. There may be a difference in words, but none in matter, between an order to fill up the blank with the name of the substitute and the nomination of a substitute. The nomination is implied in the order, and, therefore, although the order could not be executed in the specific way directed, that in justice ought not to hurt the implied nomination. A procuratory of resignation was anciently no more than a mandate, which fell by the death of the granter; yet the person in whose favour the procuratory was conceived had an action against the heir-at-law to divest himself of the estate. The filling up Sir John's name in the blank, authorized by so formal a deed, is therefore valid, and does not fall under the Act of Parliament anent blank writs. At all events, the heir is liable to make good the nomination.

On the report of LORD NEWHALL, the Lords found, "That the disposition was not filled up in terms of the Act of Parliament 1696, anent blank bonds, and therefore must still be looked upon as blank in the substitution. But found that the docquet of itself imported a substitution in favours of the persons filled up in the said disposition, and found the action, upon the head of deathbed, competent to the pursuer, though a remoter heir, notwithstanding that the nearest heir was the person who was institute."

JUDGMENT.
July 4, 1722.

On Reclaiming petitions from both parties, the Court "Ad-hered." July 13, 1722.

II.—STEWART v. PORTERFIELD.

In 1721, Alexander Porterfield, in the marriage contract of his son William, executed an entail of the lands of Duchal in favour of himself in liferent, and in fee, to the following series

Sept. 28, 1881
NARRATIVE.

STEWART
v.
PORTERFIELD.
1881.

of heirs, viz., 1. To his son William, and the heirs-male of his present marriage. 2. To the heirs-male of William by any other marriage. 3. To the heirs-male of the entailor's own body. 4. To the eldest heir-female of William's body, and the descendants of her body without division. 5. To the next heir-female *successive* of William's body, and the descendants of her body, all without division. 6. To any other heirs of tailzie to be nominated by the entailor, by a writ under his hand, at any time in his life-time, in his *liege poustie*. 7. To the eldest heir-female of the body of the entailor, and the descendants of her body, without division. 8. To the next heir-female *successive* of the entailor, and the descendants of her body, without division. 9. To the heirs whatsoever of the entailor.

The entailor reserved to himself "full power and liberty, at any time in his *liege poustie*, to alter, innovate, or change the order, course, and succession of the haill heirs of tailzie above specified, except the heirs-male and female of his son's body, and the heirs-male descending of his own body, and that by a writ under his hand, notwithstanding of this present right of fee and infetment to follow hereupon in favour of the said William Porterfield and the heirs of tailzie above specified."

The contract was recorded in the Register of Entails, and Infetment was taken on the precept contained in it.

The entailor afterwards acquired the lands of Blacksholm, and in 1742 he executed a new deed of entail, proceeding on the narrative of the marriage contract of 1721, and the reserved power therein contained. It farther narrated, "And seeing that since making the foresaid bond of tailzie I have purchased the ten shilling land of Blacksholm, &c., and being resolved to adject, eik, and add the said new purchased lands to my tailzied estate above specified, with and under the same clauses and provisions mentioned in the foresaid bond of tailzie, *but with the alteration, change, and innovation of the order, course, and succession therein contained and above repeated*, in so far as is inconsistent with the order, course, and succession under written, which is hereby declared to be the order, course, and succession of my foresaid estates and lands, *both old and new*, with and under the additional clauses and provisions after specified."

The destination of this entail was, 1. To the heirs-male of

his son William's body of his present or any subsequent marriage, "excluding William himself from any succession to the late purchased lands." 2. To the entailer's grandson, Boyd Porterfield, by his second son John, and the heirs-male of his body. 3. To the heirs-male of the body of his uncle, Alexander Porterfield of Foolwood. 4. To the heirs-male of the body of his cousin, Gabriel Porterfield of Hapland, "and that because I reserve to myself a power to name the subsequent heirs of taillie after my son William Porterfield, and his heirs as aforesaid." 5. To Jean Porterfield, his eldest daughter, spouse of James Corbet, and his other daughters *successive*, and the heirs-male of their bodies. 6. To the heirs-female of the body of his son William, *successive*, and the descendants of their body, without division. 7. To the eldest heir-female of the body of his grandson, Boyd Porterfield, and the descendants of his body, without division.

STEWART
v.
PORTERFIELD.
1881.

This deed of entail, although it referred to, did not convey the lands contained in the marriage contract of 1721. It exceeded, too, the powers reserved by the entailer in that contract, in so far as he postponed the heirs-female of his son William's body to the heirs of the bodies of Alexander and Gabriel Porterfield, and to his own daughters and the heirs of their bodies. William, however, had no heirs-female of his body.

The entailer died in 1743, and his son William made up titles to the lands of Duchal, under the contract of 1721. He died in 1752, when he was succeeded by his nephew, Boyd Porterfield, who also made up titles under the contract. Boyd Porterfield died in 1795, and was succeeded by his son Alexander, who also made up titles under the contract. He died in 1815, without issue.

The destination of heirs contained in the entail of 1742 was never engrossed in the investitures of the lands of Duchal, which followed upon the contract of 1721.

On the death of Alexander Porterfield a competition arose between Sir Michael Shaw Stewart Porterfield, who was the eldest son of Boyd Porterfield's eldest daughter, and Mr. Corbet Porterfield, the grandson and heir-male of Jean Porterfield the eldest daughter of the entailer, regarding the lands of Duchal.

The seventh substitution in the contract of 1721 was in favour of the eldest heir-female of the body of the entailer, and

STEWART
v.
PORTERFIELD.
1881.

the descendants of her body, without division. Sir Michael Shaw Stewart claimed under this substitution, being the eldest son of the eldest daughter of Boyd Porterfield.

In the entail of 1742, Jean Porterfield, the eldest daughter of the entailer, and the heirs-male of her body, were preferred to the eldest heir-female of the body of Boyd Porterfield. Mr. Corbet claimed under this deed.

ARGUMENT FOR
MR. PORTER-
FIELD.

PLEADED FOR MR. PORTERFIELD.—By the deed of 1742, the entailer's three daughters, and their issue male, were called to the succession in preference to the heirs-female of the body of Boyd Porterfield. As the prior substitutes have all now failed, Mr. Porterfield, as heir-male of the entailer's eldest daughter, is entitled to take up the succession in preference to the latter.

The power of nomination reserved by the entailer was based on the actual disposition *heredibus postea nominandis*. In its exercise it required no new or reiterated terms of disposition or conveyance, nor, indeed, any other technical peculiarity whatever. Its only essential qualities behoved to be an intelligible expression of the will and intention of the entailer, and the expression of that will and intention executed by him in *liege poustie*. For this purpose it was not required that his will should be set forth in a separate instrument, purporting to have the exercise of this power of nomination for its sole or substantive object. It was enough for the legal and effectual exercise of the power that the entailer's will should be embodied in any written form, whether solely intended for that particular purpose, or as a part of some other deed which admitted of the insertion of the intelligible expression of his will or the part in question.

The power of executing an entail, by putting the dispositive clause and the subjects entailed into one deed, while the names of the heirs, or certain classes of them, with the limitations under which the estate was to be held, were contained in another, executed in reference to the first, is almost coeval with the introduction of strict entails themselves. The entail of the estate of Roxburgh, in 1648, was merely a nomination of heirs under the substitution contained in a Crown charter, obtained in 1646. A destination *heredibus nominandis*, completed by a deed of nomination, may be carried into effect by service and retour.

Such a destination is as much an actual substitution and conveyance, carrying a legal right to the persons who may be so appointed, as a destination to the heirs-male of an individual is a conveyance to the person who may be legally proved to hold that character when the succession opens.

STEWART
v.
PORTERFIELD.
1881.

The plea that the deed of 1742 was not a deed of nomination, but of alteration, under the reserved power to alter, is unfounded. These two modes of introducing successors to an entailed estate are entirely different, both in their nature and effect. In order to make an effectual alteration, a deed of alienation or disposition of the subjects to a different series of heirs is requisite, or, at least, an obligation to grant an alienation is necessary. In the one case the feudal grant is made by the original deed, in the other it is made by the new grant.

The alleged excess of power in postponing the heirs-female of William's body was a mere oversight of the conveyancer, and a very venial one, since William had no daughters, and no prospect of any family.

There are no *termini habiles* for the operation of the positive or negative prescription. The title under which the estate was possessed was not more exclusive of the right of one party than of that of the other. It was common to and in favour of both, being the deed of 1721, which contained, in *græmio*, the destination *hæredibus nominandis* in the *sixth* as well as that of the heirs-female of the body of the entailer in the *seventh* substitution. To enable a party to claim the benefit of the positive prescription, there must be a diversity of title between the one possessed and the one claimed under. But here there is only one title. As to the negative prescription there must have been in the party excluded a *valentia agere cum effectu*, but this was not the case in the present instance.

PLEADED FOR SIR MICHAEL SHAW STEWART.—The claimant is the heir of the investiture under which the lands in question have been held since the date of the contract of marriage in 1721. The *sixth* substitution in that contract in favour of the heirs to be nominated by the entailer was not an actual substitution, which, on the nomination taking place, could render the nominees the heirs of the original investiture. It is not denied

ARGUMENT FOR
SIR M. S.
STEWART.

STEWART
v.
PORTERFIELD.
1881.

that a substitution, in an investiture, of heirs to be subsequently named by the disponent, may, when followed by a nomination, confer a right of succession on the nominees, which, if urged in proper time, will be effectual. But the question is, In what way that right operates? Does it merely create, in favour of the nominees, an obligation against the proper heir of the investiture to submit to the insertion of the new destination, or does it render the nominees the heirs of the original destination itself? Does it, in short, operate in itself as an actual and complete substitution, creating an instant and legal right of succession, as a destination to the heirs-male of an individual is an instant creation of a right of succession in favour of the person who may be legally proved to hold that character when the succession opens?

A substitution of "heirs to be named," is, in form, a substitution, but it is in substance a declaration that the investiture contained no such substitution. It is a substitution left blank, and it is the deed of nomination alone which renders it real. Such a substitution is no better than a blank, with a reserved faculty in favour of the person who is entitled to fill it up. If the deed filling it up be urged in proper time, it may afford the nominated substitutes the means of becoming the heirs of a new investiture, composed of the original destination combined with the second deed. But it does not render them the heirs of the investiture as it originally stood. The right conferred on the nominated substitute to be admitted into the original investiture is long since extinguished by the negative prescription. It was an obligation not followed forth against the heirs of the original investiture, and on which no document has been taken within the period required by law.

The deed of 1742 is not a deed of nomination. It is a deed of alteration. Under his reserved power the entailer was entitled both to nominate and alter. If he nominated, all he had to do was to fill up the *sixth* substitution. But he could not, under the power to nominate, extinguish the seventh. He might have done so by a deed of alteration, but then the person claiming under the deed of alteration must abandon all title to claim under the deed altered.

The deed of 1742 was a deed exceeding the powers reserved

by the entailor. The period for estimating whether the deed was *infra* or *ultra vires* of the entailor was the period of his death. At that period William was alive, and might have had heirs-female of his body ; and yet, by the deed of 1742, parties were called before these heirs-female, whom it was not in the power of the entailor to disappoint. The deed is thus null and inoperative, and being so, at the death of the entailor, it cannot be revived and become valid, because, after a lapse of years, the accidental event supervened of William dying without issue female. The deed cannot be held to be invalid in some particulars and valid as to others. It must stand or fall together.

STEWART
v.
PORTERFIELD.
1831.

The deed of 1742 is also cut off by both the positive and the negative prescription. Since the death of the entailor, the lands in question have been possessed under a title in which Sir Michael is the heir, and under no other destination, for more than forty years. His *jus crediti*, as a substitute, has been placed beyond challenge by the possession which has followed upon that title during that period. If the deed 1742 gave the nominees a claim to step into the *sixth* substitution, they should have enforced it. Not having done so, the obligation against the substitute is extinguished by the negative prescription.

The Court Found, "That Mr. Corbet Porterfield was entitled to be served heir of tailie and provision under the brieves purchased by him, and remitted to the macers to proceed in the services accordingly, and to dismiss the brieves at the instance of Sir Michael Shaw Stewart, Baronet."

JUDGMENT.
June 22, 1820.

To this Judgment the Court afterwards "Adhered."

May 15, 1821.

Sir Michael Shaw Stewart having died, his son Sir Michael appealed against these judgments, when it was Ordered and Adjudged by the House of Lords, "That the said cause be Remitted back to the Court of Session in Scotland, to review generally the interlocutors complained of : And it is farther Ordered, That the Court to which this remit is made, do require the opinion in writing of the other Judges of the Court of Session on the whole matters and questions of law which may arise in this cause, which Judges are so to give and communicate the same, and after so reviewing the interlocutors complained, the said Court do and decern in the said cause as may be just."

House of Lords.
Remit.
May 24, 1826.

STEWART
v.
PORTERFIELD.
1831.

LORD GIFFORD observed,—“ My Lords, The first question in the cause, and which was discussed in the Court below, and at your Lordships’ Bar, was upon the effect of the instrument of 1742. The first question upon the effect of that instrument is, Whether it is to be considered with reference to the settled estate, as a deed of nomination of heirs to take under the former deed, or a deed of alteration under the reserved power to alter ? If as a mere deed of nomination, then the question is, Whether it operates so as to render the nominees heirs of the original destination, or only as an obligation on the proper heir of investiture that they should be added to the succession ? In short, whether the party nominated is enabled to serve as an heir of investiture under the original deed, considering the deed of nomination as evidence to show that he is the person to whom the description applies ; or whether the deed is to be considered as a deed of alteration ? And your Lordships see that this is an extremely important distinction. If it is to be considered as a deed of alteration, then the question arises, Whether it was not *ultra vires* ? For your Lordships will perceive, that, in this deed of 1742, he has passed over altogether the heirs-female of William. William had no heirs-female at the time of the alteration ; but I apprehend that the validity of this deed must depend upon its being valid or not at the time of its execution ; and if it was at that time *ultra vires* of him to execute this deed, it cannot become valid by a subsequent event, showing that there was no heir-female who could take under the original settlement.

“ Then, if it were *ultra vires*, another question would arise, Whether it was void altogether, or void only as to the excess ; and whether it was challengeable by all the persons named in the subsequent limitations, or was only challengeable by the heirs-female ; and as there were no such persons to challenge the validity of that deed, whether it was not good as against all other persons claiming under the original settlement ? But still supposing that the respondent is correct in either of these views,—namely, first, in establishing that it was a deed of nomination, or, if it were not a deed of nomination, that it was a deed of alteration, affecting none but the heirs-female,—the appellant contends, that the respondent is barred by prescription ;

because, for more than forty years, the titles have been made up by the Porterfields without any reference to that deed of alteration or nomination, and without that deed of alteration and nomination ever appearing in the investiture ; and, therefore, the appellant contends, that whatever was the effect of that deed, whether it was a deed of nomination, or a deed altering the tailzie under the power of alteration, still he says that he is entitled to be served heir, because those deeds never appear in any investiture. No reference, as he says, was made to them, except in making up titles to a part.

STEWART
v.
PORTERFIELD.
1881.

“ I think this is a case in which it would be extremely desirable, not so much from the value of the property, which I understand is at stake in this cause, because the value of the property is immaterial to your Lordships, if the points are perfectly clear, but in consequence of my feeling, as I do confidently, that there are points of very great importance, as affecting not only this particular case, but some of them as affecting general questions of Scotch law, and more particularly with reference to the modes of making up titles under such instruments as these, whether they are to be called deeds of alteration or of substitution ; and also with respect to the effect of prescription in such a case, on which it would be desirable your Lordships should be fully informed of the opinions of the learned Judges of the Court of Session.”

In consequence of the Remit, Cases were appointed to be laid before the other Judges for their opinion on the question, Whether, on a consideration of the whole pleas respectively urged by the parties, Sir Michael Shaw Stewart or Mr. Corbet Porterfield is entitled to be served under the competing brieves, or either of them ?

QUESTION SUB-
MITTED.

In the Joint Opinion returned by Lord President Hope, Lords Balgray, Craigie, Gillies, Corehouse, and Newton, their Lordships observed,—“ The question proposed to the Court, namely, Whether Sir Michael Shaw Stewart or Mr. Corbet Porterfield is entitled to be served under the competing brieves, or any of them ? appears to us to depend on the decision of the two pleas in law, on which parties are at issue :—1. Whether the instrument 1742, in so far as it calls Jean Porterfield and the

OPINIONS.

STEWART
v.
PORTERFIELD.
1881.

heirs-male of her body to the succession of the estates which form the subject of competition, is inoperative from want of power in Alexander Porterfield, the maker? 2. Whether the claim of Mr. Porterfield under that instrument is extinguished by prescription?

“ These pleas are now stated in the natural order of inquiry, but they can be discussed more conveniently by reversing that order. If it can be shown that Jean Porterfield and the heirs-male of her body held a place, within the years of prescription, as substitutes in the entail 1721, prior to the heirs-female of the body of Boyd Porterfield, it is indisputable that their right cannot have been lost by prescription since that period; for William Porterfield, and his nephew Boyd Porterfield, possessed the estate of Duchal and Overmains by virtue of the investiture under the marriage-contract 1721 alone, and therefore could not prescribe against their own title, which bore *in gremio* the sixth substitution to heirs to be named by the entailer, as well as the seventh to the heirs-female to be born of his body. On the other hand, if Jean Porterfield and the heirs-male of her body were not substitutes under the entail 1721 prior to the heirs-female of the body of Boyd Porterfield, but were only entitled to demand execution of a new entail calling them in that place, it is possible that that obligation, not having been enforced against the heirs in possession, may have been so extinguished.

“ According to the argument of Sir M. S. Stewart, if an investiture contains a substitution *hæredibus nominandis*, and a nomination is afterwards executed, the nominees are not heirs of the investiture, unless the instrument of nomination shall be incorporated with it, or a service expedited under the nomination as a title, which he seems to think would render it part of the investiture. We are of opinion that that plea is not maintainable. It is an established principle in the law of Scotland, that heritable property can be conveyed only by certain forms of expression importing the present disposal of the subject, as in the ordinary style of a procuratory of resignation or disposition. But if the appropriate form of expression is used, it may be effectually conveyed, not only to persons in existence, but to future and contingent persons, substituted to each other in a series of any length; and on that principle the law of entail is

founded. In a destination of this nature, it is immaterial by what description the substitutes are called, provided only that means are given to ascertain each as the succession opens to him. They may be designated as the heirs or descendants of persons known ; or, without reference to propinquity, they may be pointed out by any other intelligible distinction. On the failure of prior substitutes, if the persons so characterized are in existence, they are entitled to take up the estate as heirs by service or precept of *clare constat*, as well as if they had been named in the entail. The clause of conveyance, although they were not *in esse* when it was framed, is the sole foundation of their right ; for it is by the form of conveyance alone that the character of heir of provision or substitute can be impressed.

STEWART
C.
PORTERFIELD
1881.

“ A tailzie disposing to A. and his heirs-male, followed by a declaration that after the failure of A. and his heirs-male, B. and his heirs-male should succeed, would be totally inoperative as to B. and his heirs, the words of conveyance being wanting. At least, a service as heir would not be competent to B., though he might perhaps be entitled to recover on a decree of constitution and adjudication in implement against the next heir under the standing investiture, and in that way complete his right to the estate. But though uncertain and contingent persons may be heirs of tailzie, when the succession opens to them, they must resort to that species of evidence which the nature of the case requires, to satisfy the inquest that they are the objects of the destination. That evidence may be parole testimony, if the description given has reference to such facts as birth, marriage, or descent ; or it may consist exclusively of written documents, if the substitute is designated by a quality susceptible only of that mode of probation. But in neither case is the evidence any part of the conveyance, which must be complete in itself, or totally inoperative.

“ One example of contingent conveyance, very frequent in practice, is a substitution in favour of persons to be afterwards named by the entailer. This is convenient, because it saves the trouble of executing a new entail—a deed cumbrous and expensive, and of difficult preparation—when additional substitutes are to be introduced, or the previous order of succession to be varied. The contingency is thus made to rest, not on extrinsic

STEWART
C.
PORTERFIELD.
1881.

circumstances, or events independent of the entailer, but on a resolution to be afterwards formed in his own mind. There is, however, no difference in principle between that and any other contingency by which the entailer may think fit to regulate his succession. In the case of a substitution *hæredibus nominandis*, as in every other case of substitution, the deed of entail, as a conveyance, must be complete in itself, and fit for the transmission of heritable property ; while the instrument of nomination, which is not required to contain any conveyance, to impose any obligation, or to be prepared in any technical form, provided it be an authentic writing, is merely evidence that the condition of the previously existing grant is purified. This form of substitution occurs at an early period in the history of the law, and it is given by Dallas, the first and best of our writers on conveyancing, as part of the ordinary style of an entail. Mr. C. Porterfield has cited various cases from the records of this Court, in which persons have been served heirs of tailzie, on producing to the inquest instruments of nomination, as evidence that they were substitutes under an investiture so framed. Sir M. S. Stewart maintains that a substitution *hæredibus nominandis* in an entail is identical with a reserved power to execute a substitution ; that the instrument of nomination is not the evidence of the nominee's right, but the source of it ; that, previous to the nomination, the substitution is a mere blank ; and that the nomination, therefore, is a constituent and essential part of the conveyance, or investiture proceeding upon the conveyance.

“ We are of opinion that these positions are entirely unfounded. It has been already observed, that a conveyance to an uncertain and non-existing person is valid, to the effect of constituting him heir of tailzie when he exists and is ascertained, whereas no deed or instrument can operate to that effect, unless it contains dispositive and technical words ; and that, in the case in question, the whole force of conveyance lies in the entail, the instrument of nomination requiring no words of disposal, and therefore in no respect savouring of the nature of a conveyance. In further illustration, and as a decisive proof of this point, reference may be made to grants of honours before the Union, which, in this respect, were exactly upon the same footing as lands, except that a grant of honours necessarily flowed

from the Crown, and could not be extended, varied, or modified by a subject. But in Scotland 'it was usual to obtain grants of honours, not only to the grantee and his heirs-male and of tailzie, referring to the particular entail then made, but also to the heirs of tailzie whom he might thereafter appoint to succeed him in his estate, and even to any person whom he should name to succeed him in his honours at any time in his life, or upon deathbed.' This is certified in the return of the Lords of Session to an order of the House of Lords in 1739. And the return bears, that 'as it is impossible to trace through the records such nominations and appointments, which in some cases may be valid, though not hitherto recorded, the Lords of Session are not able to give your Lordships any reasonable satisfaction touching the limitations of the peerages that are still continuing.' Accordingly, no doubt was ever entertained of the efficacy of such grants, and various peerages have been held under them. Now, the King is the sole fountain of honours, and cannot delegate the power of conferring them ; the royal grant, therefore, in these cases was of necessity complete before the instrument of nomination was executed ; and the nomination, being the act of a subject, could form no part of it, nor serve any purpose but to point out the individuals to whom the honour so granted belonged.

" Various attempts have been made by Sir Michael Shaw Stewart to distinguish the case of *hæredes nominandi* from that of other contingent heirs ; but we are of opinion that all those attempts are unsuccessful. It is said that a disposition to an unborn heir involves but one contingency ; whereas a disposition to the heir of a person to be named depends, for effect, on a double contingency, viz., *First*, Whether a nomination shall be made ; and, *Second*, Whether the person nominated shall have an heir. But when it is once admitted that a contingent conveyance is effectual, and the whole law of tailzie rests on that principle, it matters not how many contingencies are combined to form the condition under which any substitute is called ; and in practice such combinations are frequent. Next, it is said that the nomination must accrue to the tailzie, and constitute a part of it, because it is necessarily an instrument in writing, whereas parole proof is admissible, if the claim of the substitute rests on

· STEWART
v.
PORTERFIELD.
1831.

STEWART
v.
PORTERFIELD.
1831.

propinquity, or any other circumstance extrinsic of the conveyance. Every condition under which a substitute is called, must be proved to the inquest by that species of evidence of which it is susceptible. If it be a fact, as birth, marriage, or domicile, a proof *prout de jure* is competent ; if it be the possession of an honour or office, a grant, patent, or record, must be produced ; if it be connected with any landed right, it must be established by reference to the deed, or instrument constituting that right. But the proof which brings an individual under the description of substitute, must not be confounded with the substitution itself.

“ Lastly, It is said that an instrument of nomination must be recorded in the Register of Entails, to make it effectual against purchasers and creditors, from which it is inferred that the nomination is part of the entail. There is no authority for that assumption, except a recent decision of a Lord Ordinary in the Outer House in a question arising out of this entail. But admitting that decision to be well founded, the inference does not follow. The Statute 1685 is remarkable for incorrectness of expression, and in consequence it has given rise to endless litigation. It nowhere provides that tailzies shall be recorded, but that the names of the maker of the tailzie, and of the heirs of tailzie, shall be recorded, together with the general designations of the estates, the conditions and provisions, and the irritant and resolute clauses. Now it is impossible that the names of heirs should be recorded, if they are not in existence at the time of recording. But the Act being for the security of the public, it is expounded in the manner most beneficial for that purpose, and therefore it may be right to require that when there is a relative instrument containing the names of the heirs, that instrument, although no part of the tailzie, should also be recorded. This may be convenient for the security of creditors and purchasers ; it falls within the provisions as well as the purview of the Act—provisions which, in the ordinary case, cannot be literally complied with. But however the point may be decided, it does not in the least affect the question now under consideration.

“ Holding, therefore, that a substitution *hæredibus nominandis* is essentially different from a reserved power to alter the

destination in an entail, with which Sir M. S. Stewart endeavours to confound it, and that the heirs named by virtue of such a substitution are entitled to serve under the original investiture, it remains for consideration whether Jean Porterfield and the heirs-male of her body were nominees under the sixth substitution of the entail 1721 ; or whether, as Sir M. S. Stewart contends, their only claim, if they had a claim, rested on the power of alteration reserved in that deed. Any ambiguity on this point arises solely from the circumstance that Alexander Porterfield, instead of applying to a skilful conveyancer to prepare his settlement in 1742, employed a country practitioner, who, from want of experience, or motives of economy, resolved to make one deed answer the purpose for which two should have been employed, and expressed, in a short member of a short sentence, that which would have required some pages fully and correctly to explain. Yet that clause, brief and general as it is, does not appear to us to produce serious ambiguity.

STEWART
v.
PORTERFIELD.
1881.

“ The instrument in which it is contained, is an entail of the estate of Blacksholm, termed the New Estate, of which Alexander Porterfield was the unlimited proprietor, and placed under no engagement whatever ; and, accordingly, he settles it by a regular disposition, containing precept of sasine, on the series of heirs which he thought fit to call to his succession. But that disposition contains no conveyance of Duchal, which Alexander Porterfield, though no longer fiar of that estate, was unquestionably entitled to execute by virtue of his reserved power of alteration. Neither does it impose any obligation on his representatives to execute such a conveyance. It leaves the investiture of Duchal untouched ; but it declares that the order of succession set down for Blacksholm shall also be the order of succession for Duchal. Without a conveyance, therefore, and without an obligation to convey, what can this declaration import, except that the heirs of Blacksholm are nominated the heirs of Duchal—a proceeding competent under the substitution *hæredibus nominandis*, but which, without that substitution, would have been totally inoperative.

“ The second plea maintained by Sir Michael Shaw Stewart is, that the deed 1742, in so far as it calls Jean Porterfield and

STEWART
v.
PORTERFIELD.
1831.

the heirs-male of her body to the succession of Duchal, is null for want of power.

“ By the marriage contract 1721, Alexander Porterfield reserved power to regulate the succession of that estate, except in so far as the heirs of the body of his son William, and the heirs-male of his own body, were concerned. But in the entail of Blacksholm in 1742, an estate entirely in his own power, he preferred the heirs-female of his own body to the heirs-female of William’s body ; and he declared at the same time that the succession should be the same in both estates. William never had heirs-female of his body ; but as they were *in posse* in 1742, it is said that this declaration was *ultra vires* of Alexander the entailer, and vitiated the whole nomination in reference to Duchal.

“ We are of opinion, in the first place, that it was not the intention of Alexander, in the deed 1742, to prefer the heirs-female of his own body to those of William’s body in the estate of Duchal. In the narrative of that deed he recites the obligations contained in the contract 1721, and in particular he recites fully and distinctly the obligation in-question—a recital inconsistent with the supposition of his intention to violate that obligation in the very next clause of the deed. It is true that he calls his own daughters and their issue-male, before the heirs-female of William’s body, to the succession of Blacksholm, as he was entitled to do. It is also true, that in brief and general terms he appoints the succession in both estates to be the same. But on the principles already explained—principles universally recognised in the exposition of deeds—that appointment must be construed *secundum subjectam materiam*, and the generality of the terms restricted by reference to the context. When he declares that the order of succession shall be the same in both estates, it must be construed that he intended it to be the same, only in so far as he had right and power to make it the same, and not in so far as he had neither right nor power to do so, as he had expressly admitted in the sentence immediately preceding. It is unnecessary to cite examples of such a construction in restricting general terms to a specific meaning, or otherwise modifying words which go beyond the will of the maker of the deed. They are familiar to every one acquainted with the prac-

tice of equity in this or any other civilized country ; and recent cases in the law of entail, of great magnitude and importance, have been decided on that ground in this Court, and in the House of Lords.

STEWART
v.
PORTERFIELD.
1831.

“ But granting in argument, what it is impossible to admit in fact, that Alexander Porterfield intended by this deed to violate an obligation, the subsistence of which he had so expressly declared, we are of opinion that an abortive attempt to confer the preference in question would not annul the deed, in so far as it was within his power. There is nothing to prevent a separation of the good substitutions from the bad, such separation being matter of daily practice in enforcing the provisions of entails. Many precedents might be referred to of this nature ; and in particular that of Mackay against Lord Reay, alluded to in the argument for Sir Michael Shaw Stewart. In that case a destination, in one part within, and in another beyond the power of the entailer, was sustained in part, and in part reduced. The distinction attempted to be taken by Sir Michael Shaw Stewart we consider unfounded. In the present case, *quoad* the *jus disponendi*, the power of regulating the succession of the estate, Alexander Porterfield was an absolute fiar, as much as Lord Reay was in the other case. Both were restrained as to certain substitutions, and, *quoad ultra*, both were unlimited. If Alexander’s power had been conferred by constitution instead of reservation, the case might have been different. We are of opinion, therefore, that there is no excess of power in the deed 1742 of the nature alleged by Sir Michael Shaw Stewart ; and although there had, that it would have been immaterial in the present competition.

“ These views, which have been stated in reference to the lands of Duchal and Overmains, apply *a fortiori* to the superiorities of Porterfield and Hapland, to which Boyd Porterfield completed a feudal title, bearing express reference to the deed 1742.

“ Therefore, in answer to the question proposed, we are of opinion that Mr. Corbet Porterfield is entitled to be served heir to William Porterfield in the lands of Overmains,—to Boyd Porterfield in the superiorities of Porterfield and Hapland,—and to the late Alexander Porterfield in Duchal.”

STEWART
v.
PORTERFIELD.
1831.
OPINIONS.

In the Opinion returned by LORD MACKENZIE, his Lordship observed,—“ Alexander Porterfield, under the deed of 1721, had undoubtedly a power of nomination, as well as of alteration. These were different in their nature, and in consequence of the base infeftment taken, which carried the property, came to be different in their modes of operation. The power of nomination did not enable Alexander Porterfield to take out from the destination any heir, or class of heirs, or to change their place in the destination, but merely to insert heirs at a particular part of the destination. The power of alteration enabled him to do any thing he pleased with the destination, so far as subject to that power, and most eminently to change the places of heirs, or classes of heirs. Again, the power of alteration, after the base infeftment had been taken, could not operate without new infeftment.

“ When an investiture is once constituted by infeftment, whether public or base, whatever power any person may have to alter the destination of it, that alteration cannot be completed without the extinction of this investiture, and the creation of a new one by new infeftment, with a destination agreeable to the alteration. Accordingly, Alexander Porterfield had provided for this by the obligation which he inserted, binding William Porterfield and his heirs to make up titles agreeably to any alteration of the destination he should make under his power to alter. It may be argued that this obligation was broader, and that it extended even to the power of nomination, not trusting to the efficiency even of that power without new investiture. But I do not think it necessary to found upon that. This at least is clear, that in relation to the power of alteration it was necessary, because Alexander was himself divested of the fee, and had no power himself to obtain new infeftment.

“ In regard to the power of nomination of heirs under the substitution *hæredibus nominandis*, I am inclined, though even here there are difficulties, to hold that the base infeftment had not a similar but a stronger effect. I am inclined to hold that the effect of the due execution of that power of nomination must have been to communicate immediately to the heirs nominated under it the same benefit that was held by the heirs nominated in the other substitutions of the deed 1721, and that

without any new infeftment being taken, or any occasion for exercise of the obligation to make up new titles imposed on William Porterfield and his heirs. When I consider the principles admitted into our feudal law in the constitution of rights by confirmation, and looking to the practice, so far as I have been able, I think that a substitution *hæredibus nominandis* in a feudal grant, on which infeftment has been taken, is not merely a power to name additional heirs to be brought into the investiture by new infeftment, nor even this power joined with an implied obligation on the superior granting the infeftment to receive these heirs, as in a regress,—but is a power to the nominator actually to name heirs who shall take under the existing investiture, as if the superior himself had named them in the original grant before infeftment was taken upon it,—the deed of nomination thus connecting with the deed referring to it, and forming part of the completed investiture, along with the original grant and sasine, just as a base infeftment that is confirmed by the proper superior does.

STEWART
v.
PORTERFIELD.
1881.

“ This seems to be the view taken, not only in the Roxburghe entail, which was ratified by the Scotch Parliament, but in various other important deeds of the same kind, some of which have been stated by Mr. Porterfield, and others are in Dallas’s Styles. In this way, I think that though a base infeftment was taken on the deed 1721, yet that if a proper nomination, in terms of the substitution *hæredibus nominandis*, had been made by Alexander Porterfield, this would immediately, and of itself, have qualified the infeftment 1721, and put the heirs so nominated in *pari casu* with the heirs nominated in the deed 1721 itself. Their right would still have been subject to the power of alteration, so far as it extended, and would still have been only the right of heirs under a base infeftment ; but it would have been of the same sort in this respect as the right of the other heirs of the deed 1721, excepting in so far as these were exempted from the power of alteration by express provision of that deed.

“ Another view has been taken, which, though certainly not without much diffidence, I feel myself not able to adopt. This is, that the deed of entail 1721, or any other similar deed having a substitution *hæredibus nominandis*, is in itself instantly a full and completed conveyance, even in respect to the destination of

STEWART
v.
PORTERFIELD.
1831.

heirs, and that the after nomination of heirs is not all of the nature of a continuation of, or addition to the conveyance of right, but merely an extrinsic act, creating in point of fact persons, and evidence of the existence of persons, qualified to take under the previously completed substitution to a particular class of heirs called *hæredes nominandi*, but in no degree adding to or qualifying the deed or investiture of conveyance itself; just as marriage and its consequences are extrinsic acts, creating persons qualified to take under substitutions to heirs-male or female of the body, &c.

“ I think this is going too far. It appears to me that the nomination, under a power to do so, of persons to be heirs of tailzie under a particular entail, can never be viewed as an act extrinsic to the entail; but that, whether executed immediately, or at some distance of time, it must be viewed as a conveyance warranted by the original deed, forming the complement of that deed, and, together with that deed, constituting the whole entail. For this reason, I think that it is necessary that such nominations shall be provided to be made, and shall be made, by a deed written and probative as part of the conveyance of land, and shall not be so provided or made as to be left to parole evidence, as extrinsic facts affecting the operation of the conveyance are, such as marriages, births, continuance in life of persons qualified to be heirs, deaths of other persons, &c.; and further, I think it necessary to register such nominations under clauses in entails in the Register of Entails.

“ Suppose, for instance, an estate entailed on A, whom failing, on the heirs to be named in a writing under the entailer's hand, I do not think that the Act 1685 would be obeyed by producing nothing to the Court of Session, and putting nothing in the Register of Entails, but this deed, containing the name of the disponent, and keeping the whole destination of heirs in a sealed paper, to be opened perhaps after many years. Still less do I think it would be competent to destine a landed estate to A, and heirs to be named by the disponent in any way he pleased, and then execute the nomination by a verbal declaration, and prove it by witnesses as a mere extrinsic fact, not forming part of the conveyance, or consequently requiring a probative writing to establish it. I cannot see that any such

view as this was ever entertained by the makers of destinations *hæredibus nominandis*. In the Roxburghe case, the nomination was undoubtedly viewed as a part of the conveyance, for it contained the entailing clauses. The same remark applies to the case of Crailing. In the case of Douglas, it is expressly provided that the deed of nomination is to be holden as if expressed in the original deed. The case of Rutherford, where an entail of one estate referred to the destination in the entail of another, is not exactly in point; but still of that case, as far as it affords any light, the same view must have been taken, for the entailing clauses are contained in the deed referred to.

STEWART
v.
PORTERFIELD.
1881.

“ So in the instrument given as a style by Dallas, where the grant is ‘ to any other person or persons to be destinat and nominat by the said V. any time during his lifetime, even on death-bed, by whatsoever writ or schedule apart under his hand, and which writ is declared by the said charter to be as good and fundamental a right and title to the said heirs of tailzie so to be destinat and appointed as said is, succeeding heirs of tailzie in special in the lands and estate after mentioned, and to be infest thereupon, as if they were expressed by name and surname therein.’

“ So in the Style, p. 582, the grant is ‘ to the heirs-female procreat or to be procreat of his own body, or descending of his own body, the eldest being always preferable, and succeeding without division, whilks failzieing, to such persons, one or more, whilks the said S. J. N. has nominat and designed, or shall nominat, design, or subscribe, in any writ by him subscribed or to be subscribed, to be heirs of tailzie, and to succeed to him in the estate after mentioned, failzieing of heirs-male and female descending of his own body, and with and under such provisions, conditions, and restrictions as to the said S. J. N. shall seem expedient, which the person so designed or to be designed shall be holden to perform and fulfil; and the said writ shall be as valid and sufficient as if in thir presents insert and ingrossed.’ In the Style, p. 623, there is simply a destination *hæredibus nominandis*. All of these seem styles of signatures of entails of importance, and seem, if not the whole, the principal, having clause in favour of such heirs, contained in Dallas.

“ These deeds appear to me to be quite consistent with the

STEWART
v.
PORTERFIELD.
1881.

view I have adopted, and with that view only. Indeed, I think that this view is adopted in the very able case for Mr. Corbet Porterfield, where it is said, 'The deed of nomination, as soon as executed, accrues to, and in effect becomes a part of, the original investiture;' and the case of Douglas is referred to as showing this.

"Entertaining the view of the nature of a destination *hæredibus nominandis* that I have above explained, I come to the question, an important one in this cause, Whether the deed 1742 can be regarded as a nomination at all, or so far as to avail the respondent? I have already observed that Alexander Porterfield had in him two powers,—one of nomination of heirs under the branch of destination *hæredibus nominandis*, the other of alteration, innovation, and change. These powers were distinct and different. If he executed a nomination under that branch, this could not be regarded as an alteration, but as the completion of the destination provided in the original deed. So, if he executed an alteration, that could not be taken as a nomination under that branch; for, if so taken, it would no longer have been an alteration, and must necessarily have reduced the deed into a state of the most absurd inconsistency, the altered part of the destination being thus made to remain in the deed after the alteration.

"In respect to the form of execution, these powers were equally distinguished. The execution of the power of nomination was of course to be by a declaring the entailor's intention to name, and then naming heirs to take under the branch *hæredibus nominandis*. The alteration was by a deed declaring the entailor's intention to alter, and altering the destination, which, of course, by virtue of the obligation previously constituted in the deed 1721, bound William Porterfield and his heirs to make up new investitures accordingly. With these observations, I turn to the deed 1742; and I feel compelled to say, that though I have looked over that deed again and again, I cannot find any thing in it to show that Alexander Porterfield either intended to exercise, or did exercise in it, any power but that of alteration, and still less any power of nomination under the branch *hæredibus nominandis* that can avail in this question."

In terms of the Opinion of the majority of the consulted Judges, the Court found, "That the respondent, James Corbet Porterfield, is the person entitled to be served heir of tailzie and provision to the deceased William Porterfield in the lands of Overmains; to the deceased Boyd Porterfield in the superiorities of Porterfield and Hapland; and to the late Alexander Porterfield in the estate of Duchal: Therefore adhere to the interlocutor of the 15th of May 1821, appealed from."

STEWART
v.
PORTERFIELD.
1831.

JUDGMENT ON
REMIT.
Nov. 13, 1829.

Sir Michael Shaw Stewart having again appealed, LORD BROUGHAM, Chancellor, presiding,—“It was Ordered and Adjudged, that the Interlocutors complained of be affirmed.”

JUDGMENT.
House of Lords,
Sept. 23, 1831.

1. Baron Hume, in a note in his collection of Decisions, observes,—“Our whole system of settlement of heritage continues to rest on the notion of an immediate conveyance, and no other sort of phrase, how clear soever as an expression of the party's will, is sufficient to make amends for the want of the dispositive words *de presenti*. No deed of disinherison, be it ever so positive, is effectual to disappoint the lawful heir, if it do not also give and dispose the heritage to some other person; and if, trusting to such a deed, the testator afterwards execute a proper dispositive settlement in favour of some other person, but do this on deathbed only, the lawful heir's right of challenge is here quite as good as if no such writ of disinherison had ever been signed.

2. “And, again, if owing to any defect or inaccuracy in the description of the subjects, as given in a proper dispositive settlement,

there be any particular heritage to which the dispositive words do not apply, this shall devolve to the heir-at-law, though the deed bear plain evidence on its face of a resolution entirely to cut him off from all benefit of succession. As was exemplified in the case of David Ross, Comedian, against Elizabeth Ross, 2d March 1770. It was there found, that the testator's son had right, as heir-at-law, to certain heritable debts secured by adjudication, because the deed in favour of his sister was defective in the description of the subjects bestowed on her, though it bore strong marks of the testator's displeasure with his son, and cut him off with a bequest of one shilling to be paid him yearly on his birthday, to put him in mind of the misfortune he had to come into the world.

3. “In like manner, our law denies effect to a mere deed of nomination of heirs. It is to no purpose

for any one to order and provide, be it ever so pointedly, that John, whom failing, James, whom failing, George, shall *seriatim* be his heirs and successors in such an estate. Not only does such a deed not carry the estate directly to any of these persons, it is not even a ground of action at instance of any of them against the heir-at-law for compelling him to make up titles, and convey to them or any of them.

4. "From such a situation we have, however, to distinguish another. Put the case, that I sell, alienate, and dispoise my estate to John; whom failing, to James, whom failing, to George; all of whom failing, I sell, alienate, and dispoise this estate to such persons whom I shall afterwards name and appoint by writing under my hand. In exercise of this reserved power, and with reference to it as contained in this deed of settlement, I afterwards execute a regular writing, which nominates William for my heir, failing John, James, and George, and orders and appoints that in this event the estate shall go to William. Taken together, these two instruments are an effectual settlement and conveyance of the estate in favour of William in the event provided for. The reason is obvious. There is here in the principal deed a direct and proper dispositive act in the fourth step, though in favour of a person who is not named at the time. But as soon as the favoured person is ascertained by the relative writing, these dispositive words come to apply and attach to him,

William, equally as if there had been a conveyance to him *nomi- natim* in the leading deed. Substantially, it is the same case, when executed, as contemplated and provided for in the leading deed, the relative one falls to be considered as a portion of the former, and the two as making but one settlement.

5. "A settlement may even be effectually made, by the proper dispositive words, in favour of such heir as shall be named not by the testator himself, but by some one whom he chooses to trust and authorise for that purpose. Such a nomination was found effectual in the case of *Snodgras v. Buchanan*, December 11, 1806. And the like judgment had been given in *Murray v. Fleming*, November 28, 1729."—*Hume's Decisions*, p. 881.

6. In the case of *MURRAY v. FLEMING*, November 28, 1729, a husband disposed his estate to his wife in liferent, and to any of his blood relations she should think most fit to be nominated by a writ under her hand, in fee. A nomination was accordingly made after the husband's decease. Against the nominee claiming right to the estate, it was argued, *First*, That this was an inhabile way of transferring property; because a *fiar* cannot be created by the nomination of one who is not *fiar*. *Second*, That it is contrary to the maxim that a fee cannot be in *pendente*, but that here there is a fee conveyed, a property established, but no proprietor, until the wife choose to exercise her faculty. To this it was answered,

First, There is nothing in reason or in law to bar a fiar to name his successor in what shape he pleases. It is not material who names, but whether the nomination be by the authority of the fiar. And this is not more extraordinary than for one to give a nomination to sell his estate. *Second*, The property is not transferred until the wife interpose her nomination. In the interim the property remains with the disponent, and after his death is *in hæreditate jacente*. The Lords found, " That the disposition granted by the husband to his wife did sufficiently enable her to nominate persons to succeed to the subjects disponed, and that she having accordingly exercised that power, the persons named by her had right to succeed."

SECTION XIII.

REVOCATION OF SETTLEMENTS.

An implied Revocation of a prior settlement is not presumed, where the subsequent deed is ineffectual to carry the Lands conveyed by the prior deed, and the prior deed is held to subsist unaffected by the subsequent one.

HENDERSON v. WILSON AND MELVILLES.

Mar. 29, 1802.

NARRATIVE.

IN 1757, Walter Bowman, by a procuratory of resignation, authenticated in the Scots form, executed a strict entail of the lands of Logie, in favour of himself and the heirs of his body ; whom failing, to James Bowman, his youngest brother of the half-blood, and the heirs-male of his body ; whom failing, to THE HEIRS-MALE OF GEORGE MELVILLE, son of Jean Bowman, his eldest sister-german, and their heirs-male ; whom failing, to certain other substitutes ; whom failing, TO THE HEIRS-MALE OF THE BODY OF ISABELLA MELVILLE, eldest daughter of Jean Bowman, his eldest sister, and their heirs-male ; whom failing, TO THE HEIRS-MALE OF AGNES HENDERSON, the eldest daughter of his youngest sister ; whom all failing, to any other persons who should be nominated or called to the succession by any writing under his hand at any time hereafter ; and failing of such nomination, to his own nearest heirs and assigns whatsoever.

The deed reserved power to the granter to alter the entail at any time of his life, *et etiam in articulo mortis*, and, in general, to do everything regarding the disposal of the estate which he might have done before the entail was executed. The reservation clause was as follows :—" Reserving always to me a power

and faculty at any time in my life, *et etiam in articulo mortis*, not only to alter and change this present settlement and tailzie, by inverting and varying the course of succession thereby ascertained, and the conditions, prohibitions, irritant and resolute clauses thereby prescribed, in such other manner as I shall think fit, but also to sell, wadset, or otherwise dispose of the lands and estate before mentioned, in whole or in part, and everything to do with relation to the disposal and burdening thereof, which I might have done before granting of this present procuratory and tailzie."

HENDERSON
v.
WILSON &
MELVILLES.
1802.

Of the same date as the entail, the granter made his last will and testament in the English form, by which he bequeathed to trustees his whole estate in England, real and personal, to be laid out in the purchase of lands as near to his estate of Logie as might be, and to entail the lands so purchased on the same series of heirs, "and under the conditions and limitations, word for word as I have used in the settlement thereof."

In 1763, the entailer executed a second procuratory of resignation, entailing the same lands, and nearly in the same terms with the former entail, but with some variations in the substitutions. The destination by this deed was in favour of James Bowman, his younger brother of the half-blood, and the heirs-male of his body; whom failing, to GEORGE MELVILLE, son of Jean Bowman, his eldest sister-german, and the heirs-male of his body; whom failing, to ROBERT HENDERSON, GRANDSON OF ISOBEL BOWMAN, his younger sister-german, and the heirs-male of her body.

This second deed was authenticated in the English form. It did not refer to the former entail, and contained no revocation of it.

Of the same date as the second deed of entail, the entailer executed a second will, bequeathing to his executors all his real and personal estate in England in trust, for the purpose of being laid out in the purchase of lands in Scotland, lying as contiguous to the lands of Logie as might be. By this will the lands to be purchased were directed to be entailed in favour of James Bowman, and the heirs-male of his body; whom failing, IN FAVOUR OF GEORGE MELVILLE, and the heirs-male of his body; whom failing, "in favour of my other heirs named, described,

HENDERSON
v.
WILSON &
MELVILLES.
1802.

and called to the succession of Logie, in the same order and with the same directions, provisions, &c., word for word as I have used in the settlement of my lands of Logie aforesaid, bearing even date with this my will."

The will also contained the following clause,—“ And hereby revoking and annulling all former and other wills and testaments whatsoever by me heretofore made, and I do declare this to be my only last will and testament.”

The testator died in March 1782. The will executed in 1757, and which was revoked by the will executed in 1763, was found cancelled in the testator's repositories at the time of his death. The entail of 1757 was found uncanceled.

The testator's brother James predeceased him. By the first deed, the next substitute was THE ELDEST SON OF GEORGE MELVILLE. By the second deed, it was GEORGE MELVILLE himself. The second deed having been laid before Mr. Ilay Campbell, as counsel, he gave it as his opinion, “ That the deed of entail in 1763 was entirely ineffectual, and could not be supported by the relative deed of settlement which was in the same situation, and could not have any effect either as a conveyance of real estate in Scotland, or as a ground of action against the heir to make it good, and that the heirs were well founded in a claim to the land estate in Scotland, and that it would be in vain for George Melville to take any step as having the exclusive right under these null settlements.” The previous deed of 1757 was not laid before counsel.

George Melville proved the will of 1763, and intromitted with the English estate. He died in 1791. His eldest son James made up titles to the estate of Logie, under the entail of 1757, and upon that title he possessed the estate till his death in 1793. Upon his death without issue, Robert Henderson was the heir of entail under the deed executed in 1763, and George Wilson was the heir under that executed in 1757. Henderson brought an action against Wilson, for the purpose of compelling him to denude in his favour. A declaratory action was also raised by Wilson against Henderson. Catherine and Christian Melville, two of the heirs-at-law of the testator, also brought an action for the purpose of having it declared that the procuratory of resignation of 1763, though ineffectual to convey

the lands, must have the effect of revoking the procuratory executed in 1757, and that, consequently, as regarded the estate of Logie, the entailer died intestate. Both Wilson and Henderson were also heirs-at-law of the entailer, as well as Catherine and Christian Melville.

HENDERSON
v.
WILSON &
MELVILLE.
1802.

A multiplepointing was also raised, in order to have it ascertained in what manner the English property was to be disposed of, doubts being entertained whether the will of 1763 could be carried into execution if the relative procuratory was not sustained.

In the action raised by Henderson against Wilson, LORD JUSTICE-CLERK BRAXFIELD, Ordinary, Found, "In respect that Walter Bowman's deed of entail of the estate of Logie 1763, is specially referred to in his will of the same date, and executed *unico contextu* therewith ; Found, That the two, taken together, fall to be considered as the settlement of his affairs, and that George Melville was not entitled to approbate and reprobate any part of the said will ; and Melville having taken up the personal estate to the amount of £10,000, found that he was thereby bound to ratify the said deed of entail 1763 ; and as the defender, George Wilson, cannot now make up titles to the said estate of Logie, as heir of James Melville, under the said entail, without being under the like obligation with him ; Therefore, Found the said deed of entail 1763 was rendered, and now is, a valid settlement of the said estate of Logie ; and decerned the defender, George Wilson, to implement the same by making up titles, and denuding in terms thereof, in favour of Henderson."

Interlocutor of
Lord Ordinary.
Feb. 21, 1794.

Upon advising a Petition with Answers, the Court ordered Memorials in all the Conjoined actions.

PLEADED FOR HENDERSON.—A person not heir-at-law, succeeding under a deed containing a reserved faculty to alter, cannot object to any alteration afterwards made by the granter even on deathbed, and no technical form is required for the exercise of such faculties. It is sufficient that deeds for that purpose be probative *secundum legem loci*. The procuratory 1763 is therefore binding on the heirs under the procuratory 1757, as being an exercise of the faculty reserved by that deed.

ARGUMENT FOR
HENDERSON.

HENDERSON
v.
WILSON &
MELVILLE.
1802.

If not effectual as a conveyance, it is at least effectual, when coupled with the former deed, as a nomination of heirs.

Where there is a valid conveyance of lands, it is immaterial in what form the donee is named. The nomination may be made either by a docquet, or by a testamentary deed, or by a new deed altogether, as in the present case. If a reserved faculty to name heirs may be executed by any writing other than a new disposition, as formal as the old one, the deed of 1763 is as sufficient a nomination as could well be made, for it is executed according to the *lex domicilii*, and is conceived agreeably to the law of Scotland. The question, therefore, comes to be—Whether the heir under the first deed, which contains the express power to alter, can be allowed to claim under that deed, and yet object to the exercise of that power in any way which the grantor thought proper?

Although the procuratory of 1763 be ineffectual, taken *per se*, yet being framed *unico contextu*, and in fact making part of the will executed of the same date, upon the doctrine of approbate and reprobate, a person taking benefit under the latter is bound to fulfil the former. Both George Melville and his son James took possession of, and benefited by, the English estate. The question comes, therefore, to be—Whether a person who has accepted and taken advantage from a will, so far as conceived in his favour, is entitled to impugn the other parts of the same settlement as defective in point of form? Or, Whether he is not bound to confirm and make effectual the other parts of the settlement, so far as he has the power of doing so?

Where a person accepts of a deed in part, and takes benefit from it, so far as it is in his favour, this necessarily implies an obligation upon him not to impugn the other parts of the same deed. On the contrary, he is bound to consent and give his aid in carrying the deed into execution in all its branches. No man can be allowed to approbate and reprobate the same deed. This is a proposition founded both on the sound principles of justice and reason, and upon legal authorities and precedents.

Where a person makes a settlement of his succession, whether contained in one deed or in separate deeds, executed *unico contextu*, he intends that the whole shall be effectual, and that every power which he has over the subjects which compose his

succession, or over the persons who are to enjoy the benefit of his succession, shall be exerted for attaining that end.

HENDERSON
v.
WILSON &
MELVILLE.

1802.
ARGUMENT FOR
HEIRS-AT-LAW.

PLEADED FOR THE HEIRS-AT-LAW.—Although heritage cannot be conveyed except by a deed executed in a certain technical form, yet the same solemnity is not necessary for revoking a deed conveying heritage already executed. A settlement of heritage once made, does not tie up the hands of the granter. It is entirely the creature of his will, and may be affected by any declaration of his will. He certainly may cancel it, and for the same reason he may declare that it shall be ineffectual. The effect of a revocation is not to convey a right to a stranger, but to reinstate the legal heir in his right. Accordingly, an English will, if executed in England, and valid according to the *lex loci*, is sufficient to revoke a former settlement of heritage in Scotland. This was expressly decided in the case of Sir Thomas Dundas against Dundas. The judgment of the Court was indeed reversed in the House of Lords; but the general principle upon which the judgment of this Court proceeded, was so far from being rejected in the House of Peers, that it was completely recognised by the learned Judge who then presided in that Court. The reversal proceeded, not upon the footing that a settlement of heritage in Scotland could in no case be revoked by an English will, however clearly expressed, but because, in that particular case, the will was so conceived as not to afford sufficient evidence that Sir Lawrence Dundas, when he made the will, meant thereby to revoke an entail which he had formerly executed of his landed estate in Scotland. A settlement of a landed estate, executed in the Scots form, may therefore be revoked by a deed executed in the form of a foreign country, provided it is a sufficient declaration of the party's intention to revoke.

It is impossible to maintain that the entail of 1757 was revoked only upon the foundation that the entail of 1768 was effectual. If the right of a stranger to enjoy an estate disposed in his favour depends entirely upon the will of the granter, and if it is clearly shown to be the will of the granter to convey the estate to another, it is *jus tertii* to the person favoured by the first deed to object that the second is not valid for all the pur-

HENDERSON
v.
WILSON &
MELVILLE.
—
1802.

poses intended by it. If it was the testator's intention to make only a conditional revocation, he has certainly not done so, and if in consequence of the second deed being ineffectual, any person is to be called to the succession by implication, the heir-at-law is more entitled to come in upon that footing than a stranger, who has no other title to claim the estate except the declaration of will on the part of the testator, which he was at liberty to recall, and which he clearly intended to recall. If, therefore, the estate is not to go to the heir called by the entail of 1763, it ought to descend to the testator's heirs *ab intestato*.

ARGUMENT FOR
WILSON.

PLEADED FOR WILSON.—The instrument of 1763 is invalid as a substantive deed of conveyance. Every deed relative to heritage in Scotland must be executed according to the formalities required by the law of Scotland, otherwise it is null and void.

Neither can the instrument of 1763 be supported as a nomination of heirs executed under the reserved power in the deed of 1757. When the granter of a regular deed reserves to himself a power of nominating heirs, although the deed of nomination need not be conceived in the same technical form with the original deed, yet it must be probative, and must refer to the original deed. But the procuratory of 1763 is not probative, and is not executed with reference to the former deed. It is a substantive deed containing all the clauses in that deed, with a number of additions and alterations. If effectual, it would entirely supersede the deed of 1757. It contains an express declaration that it shall not be lawful to the heirs of tailie therein mentioned to possess the estate under any other title, thereby indicating that it was a separate and independent instrument.

Neither George nor James Melville agreed to ratify or confirm the null and defective entail of 1763. The obligation to approbate a deed is of the nature of an agreement implied by equity, from the conduct of a person upon a full disclosure of all the consequences. A man cannot be entrapped into approbation. In point of fact, James Melville took no benefit under the will 1763.

The enactment in 1681, requiring all deeds of importance, and particularly all writings respecting heritage, to be authen-

ticated in a certain form, applies as much to deeds revoking former settlements as to the settlements themselves. There is no reason for distinguishing between the two cases. The same deliberation is necessary in both, and the danger of forgery arising from the importance of the transaction is also the same in both. If any indication of will was sufficient to revoke a *mortis causa* settlement, a testator's purpose might be established by parole testimony. The case where an attempt has been made to revoke a settlement by an informal writing, and that of a revocation by the act and deed of the testator, are quite different. A man may at any time cancel his settlements, and from that moment they cease to be evidence of his intentions.

HENDERSON
v.
WILSON &
MMLVILLES.
1802.

If, therefore, the entail of 1763 had expressly revoked all former settlements of the same nature, it could not have been sustained, having been executed in a form not authorized by the law of Scotland.

But, farther, the deed of 1763 contains no revocation. A revocation is only inferred from the testator's having endeavoured to make a new and different settlement. But there is no reason to presume that, in case the settlement in 1763 was ineffectual, the testator meant that his estate should be split and divided among his relations, as if he had died intestate. Such a result would be directly contrary to all his views, which were uniformly directed to continue the representation of his name, and to preserve his paternal estate entire. It is impossible, therefore, to maintain that a writing, which on account of its informality, is not sustained as a settlement, is to have the effect of undoing a complete and unexceptional deed formerly executed by the testator. If the entail of 1763 cannot be sustained in the way intended by the testator as a complete settlement of his estate, it cannot, without any declaration of his will, be converted to an entirely different purpose.

A deed conveying an estate, which remains uncanceled, cannot be revoked by a deed meaning to convey the same estate, which contains no express revocation, and is in itself absolutely void for want of proper form and solemnities. There is no evidence that the testator meant to revoke the former deed, for a deed which is void for want of proper forms, and contains no

HENDERSON
v.
WILSON &
MELVILLES.
1802.

express revocation, cannot be said to afford evidence of an intention to revoke a deed which is not cancelled. The circumstances under which the deed of 1757 was found afford presumptive evidence that it was not the intention of the testator to revoke it. The will of 1757 was cancelled at the time that he executed the will of 1763, by which he also expressly revoked all former wills. The deed of 1757 was not cancelled at the time that he executed the deed of 1763, but remained uncanceled, and was found uncanceled in his repositories after his death.

First Interlocutor of Court.
June 25, 1795.

The Court found, "That the estate of Logie falls to be governed by the deed of entail executed by Walter Bowman in the year 1757, and decerned accordingly. But found it unnecessary, *hoc statu*, to decide as to the residue of the personal estate of the said Walter Bowman."

Second Interlocutor of Court.
Jan. 31, 1797.

Henderson and the Melvilles having reclaimed against this Interlocutor, the Court Ordered a Hearing in presence, and thereafter Found, "That the procuratory of resignation executed by Walter Bowman in 1757, was a valid and formal settlement of his estate, excluding his heirs-at-law, but qualified with an express reservation of powers to invert or alter the order of succession, and the other clauses and conditions therein contained : Found, That the procuratory 1763, being formally executed according to the *lex loci*, although not according to the solemnities of the law of Scotland, contained a sufficient declaration of the granter's will, with regard to his succession in exercise of his reserved powers, and must be held as part of the total settlement : And, farther, that George and James Melville having, upon their succession, taken benefit from all the deeds, were not at liberty to approbate and reprobate, and the subsequent heirs must be equally bound ; Therefore, Altered the last interlocutor, and found, decerned, and declared in favour of Robert Henderson, accordingly."

JUDGMENT.
Feb. 21. 1797.

Wilson and the Melvilles having Reclaimed, the Court "Adhered."

MS. Notes.
Sir Hay Campbell's Session Papers.

On the Session Papers LORD PRESIDENT CAMPBELL has written,—“The argument with regard to the solemnities of a revocation, in the petition for Catherine and Christian Melvilles, viz., that it is enough if it be executed according to the *lex loci*,

seems to have a good deal of foundation, as a revocation is truly no more than an exercise of will which requires no specific form, but may be done by any deed which is of a probative nature. The House of Peers seems to have gone upon this idea in the case of declaring uses and purposes in the cause of Willox v. Auchterlony. But the difficulty in this argument is, that the procuratory in 1763 did not contain any express revocation of the preceding one, but only an implied revocation, by settling of new in a different manner; and even if it had contained a special revocation, it might have been doubted whether this could subsist independently of the settlement if the last became ineffectual. See the case of Crawford v. Coutts, 10th June 1795, and the case of Wilson Montgomery v. Innes, 17th May 1796.

HENDERSON
v.
WILSON &
MELVILLE.
1802.

“ The point of approbate and reprobate, upon which the Lord Ordinary’s interlocutor was laid, cannot be easily applied, unless upon this ground, that all the remoter substitutes in the deed 1757 must represent James Melville, who represented the tailier, and that James was bound, in consequence of his father and himself taking the executry, to give effect to the will of the tailier declared in his deeds 1763.

“ But independent of this, *Quæritur*, Whether taking the deed 1757 as a subsisting and effectual settlement of the heritable succession, it was not capable of being qualified as to the order of succession, as well as the conditions and limitations contained in it, by any writing under the hand of the granter in a probative form, though not in such a form as would be sufficient by the law of Scotland to convey heritage; and whether the deeds in 1763 may not be sustained to that effect, though not to the effect of being *per se* a good title to the land estate. Suppose James Bowman, the brother, had survived, he was heir in both deeds, but he could not have taken the personal estate without giving effect to the informal disposition 1763. The rule of approbate and reprobate would certainly have met him; and the only question would have been, Whether the substitute heirs of tailie in the deed 1757, could have opposed him in making a new settlement of tailie, conform to the deed 1763, or in pursuing a declarator for making the destination in the deed 1763 the rule of succession?

“ Had the estate been in him on a fee-simple, without the limita-

HENDERSON
v.
WILSON &
MELVILLE.
1802.

tions of a taillie, this difficulty could not have occurred ; but it is to be considered, whether the circumstance of the deed 1757, being fettered by the clauses of an entail, makes any difference. Walter Bowman himself was the institute in that entail, and every person serving heir under it must represent him, and must be liable to his debts and deeds ; and as he had the full power of making any variation upon the plan of his succession, no person taking up the estate under the settlement which he so made, and which is admitted to be a valid one, can object to the exercise of his will in any habile manner, making such alterations as he chose to make, either upon the limiting clauses, or upon the line of succession thereby devised. He himself was not only the maker of the settlement, but the creditor under it ; and if he chose to dispense with his *jus crediti* in whole or in part, he had right so to do.

“ In fact, he declared his will in 1763, in two different writings respecting certain alterations upon the plan of his succession. These writings are not, by the law of Scotland, probative, to the effect of settling heritable succession ; but the question is, Whether they may not be admitted as supplementary to the former disposition in 1757, and sufficiently valid as declarations of *will*, in all questions which can be regulated by mere will, such as any relative nomination of heirs, upon the principle of the case of Kennedy ? See House of Lords case for Mr. Douglas against Duke of Hamilton in 1779 ; case of Auchterlony against Willox, Appeal Cases, 30th March 1772 ; and case of Kennedy, 13th July 1722.

“ Had the deed 1757 been effectually revoked or been repudiated, there might have been room for a question with the heirs-at-law, and probably these last would have prevailed, the deed 1763 being informal as a settlement of heritable estate. But both parties admit the deed 1757 to be good, and therefore the heirs-at-law seem to be out of the question.

“ When the succession opened under the deed 1757 to James Melville, in consequence of James Bowman's predecease, it became no doubt a question of difficulty whether he was bound to denude in terms of the deed 1763, in which his father George Melville took in place of him, for the argument of approbate and reprobate did not immediately apply in that case. At the same time, supposing George had brought an action against his

son for that purpose, it is to be considered whether George would not have been well founded upon two distinct grounds. *First*, That although James did not immediately take any benefit under the deeds in 1763, he was upon his father's death entitled to such benefit, which, however, he could not take without giving them full effect. *Second*, That independent of the doctrine of approbate and reprobate, if the deeds in 1763 could be held as mere relative deeds, qualifying the settlement in 1757, effect ought to be given to these deeds in 1763, although to the prejudice of one of the heirs called in 1757.

"But although that question, had it been tried during the joint lives of James and George, might have been attended with difficulty, it became less difficult when James by surviving George became the heir in both deeds, and consequently liable to the additional argument of directly approbating and reprobating.

"James being now dead, and the succession under the two deeds having again split, the same difficulty has revived, and rather in a stronger degree, as the defender's hope of succession under the deed 1763 is more remote. This, perhaps, may bring the question in a great measure to the single point of the deed in 1763, being of the nature of relative deeds, or, on the other hand, split new settlements of succession, which must stand or fall upon their own validity alone."

After the Hearing which had been ordered by the Court had taken place, LORD PRESIDENT CAMPBELL has again written,—
"After Hearing. It is thought that the question ought to be considered as it stood when the succession opened by the death of Walter Bowman, the granter. Had James Bowman, the first substitute-heir, been then living, there seems to be no doubt that he must, upon the principle of approbate and reprobate, have given effect to the procuratory 1763, informal as it was, unless he chose to abstain altogether from the moveable succession. Neither could it have been argued, that by so doing he incurred an irritancy under the entail 1757, for Walter Bowman, the taillier himself, had the undoubted power to liberate in whole or in part from the clauses of the entail, and to vary the destination of heirs, which he accordingly did, and James Bowman could not take the estate without representing him, and indeed serving heir to him as the first institute.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

MS. Notes.
Sir Ilay Campbell's Session
Papers.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

“Walter had full powers upon three grounds :—*First*, That the deed remained in his custody, and might have been cancelled by him at pleasure. *Second*, That the fee remained with him as his absolute property, and no person could take it without serving to him. *Third*, That it contained an express power of revocation and alteration.

“It is said that a reserved faculty must always be exercised *habili modo*, that in this case, the deed being a split new settlement of succession, without any reference to the faculty, is inept by the law of Scotland, as not properly tested. Answer—Exercise of a reserved faculty, which is, in other words, a mere act of will, does not require to be executed in any precise form, if it be done by a deed or writing which is authentic and sufficiently probative of will. In the Douglas cause, 9th December 1762, an argument of this kind was maintained with respect to the Marquis of Douglas’ deed, 9th March 1699, but the objection was fully obviated in Lord Selkirk’s Memorial, 19th June 1762, and if the cause had rested upon that point, Lord Selkirk would have prevailed. Although that deed, 9th March, was not good as a split new settlement of the estate, there was no reason why it should not have been sustained as a good nomination in exercise of the reserved powers. The Court thought it unnecessary to give any judgment on that point, as there were other insuperable objections to the claim under that deed, such as that it was altered by a subsequent deed and prescription, &c.

“As to the objection to the testing clause in the present case, it would certainly be good if the deed 1763 stood by itself as a split new settlement, which would have been the case had the procuratory 1757 been cancelled. But holding it as a relative or supplementary deed in exercise of the reserved power, the question is,—Whether such a deed may not be executed in any form which is sufficiently probative of will, *e.g.*, by a latter will and testament in the Scots form, which would not *per se* be sufficient to carry the heritage, or by a latter will in the English form, which stands precisely on the same footing, equally good so far as it declares will, but not good *per se* to convey heritage in Scotland?

“The procuratory 1763 is tested in the English form and probative there. It is also supported by the will 1763, which refers

to it, and both the one and the other being formal according to the *lex loci*, ought to be sustained as good declarations of will, and consequently as full written proof of the taillier's intention, so far to vary the plan of succession contained in his taillie 1757, which, on all hands, is admitted to be formal and effectual.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

"James Bowman, therefore, had he survived his brother, would have been served heir under the taillie 1757, as explained and varied by the deeds in 1763, and must either have executed a new taillie conform to these last deeds upon a narrative of the whole settlement, and declaring the same to be binding upon himself as well as the other heirs, or must at the instance of any of these heirs have submitted to a decree of declarator and in implement to the same effect. James Melville was in the same situation if either immediately, or at the death of his father, he meant to take benefit from the will 1763. But independent of taking benefit from that will, it is thought he could not make up his titles or claim the estate under the procuratory 1757, without giving effect to the whole will of the entailer, declared in his deeds of alteration under the reserved powers, if we once lay it down that these deeds or writings could be executed in any probative form, either of the law of England or of the law of Scotland, for no man can take one part of a will and reject another part of it. He must be bound by the whole; and so far the law of approbate and reprobate applies even to James Melville, for by taking the estate itself, independent of the moveables, he approbated, and he could not reject the qualities and conditions of the deed under which he took. The same observation applies to the present defender, for if he makes a claim under the procuratory 1757, he must give way to the conditions of it; or, in other words, he can make no claim at present, but must allow the nomination 1763 to have its effect as making a part of the total settlement, and can only claim in due course after the heirs standing before him in that settlement are exhausted.

"The principles, in short, upon which the Court went in the cases of *Cunningham v. Gainer*, *Auchterlony v. Willox*, *Crawfurd v. Coutts*, and many others, must regulate the present case, and the same principles obtain in England, as appears from Lord Kenyon's opinion.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

"As to the heirs-at-law, they stand at any rate excluded by the procuratory 1757 and by the will 1763, both of which are unexceptionable; and it would be less against the will of the entailer to divide the succession according to these deeds, if the procuratory 1763 were to be laid out of the question, than to lay aside the whole deeds at once, and open up the legal succession."

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

On the Reclaiming Petition against the Interlocutor of January 31, 1797, LORD PRESIDENT CAMPBELL has again written,—
"See former notes. Heirs-at-law out of the question, as it is impossible to set aside all the deeds."

MS. Notes.
Lord Meadow-
bank's Session
Papers.

On the Session Papers LORD MEADOWBANK has written,—
"*First Point.*—Whether the deeds of 1763 can operate as a nomination of heirs to Logie to be engrafted into the procuratory 1757, and I am clear they cannot. There is, in the procuratory 1757, a reserved power to alter in general in broad terms, but such an alteration must, I conceive, be made by a deed valid by the law of Scotland. The reserved power to nominate new heirs is confined to the case of the failure of the heirs already favoured by the deed 1757, and the deeds 1763 were evidently designed to form a new settlement, and not to operate as a graft into the former settlements. Had the deed 1757 contained a reservation to declare the heirs by any authentic document, the case would have been different, but I find no such power reserved.

"*Second Point.*—Whether the deeds of 1763 can operate as a settlement of Logie from its happening that the benefit of the English will 1763, and the entail 1757, descended to the same person, James Melville, from spring 1791 to November 1792?

"The interlocutor of the Lord Ordinary adopts the affirmative of this question. This view of the case supposes that the procuratory 1757 was, till such coincidence happened, a valid and unexceptionable title to Logie, standing unrevoked by the entailer, Walter Bowman, and aptly clothed with all the forms of a Scots entail. For if it was revoked by the entailer, then there was room for the heir *ab intestato*. Hence, too, according to this view of the case, had James Melville predeceased his father George Melville, Henderson's claim would have had no foundation, and George Wilson would have taken Logie, and *continued*

to hold it under the entail 1757. And if I understand it aright it also follows from it, that if, at the distance of three centuries hence, the benefit of the succession to the English fortune, entailed agreeable to the will 1763, should chance to open to, and be accepted by the heir of entail then in possession of Logie under the entail 1757, each heir would, by that acceptance, become bound to denude of the entail 1757, and surrender it to the persons favoured by the destination 1763, to the exclusion of the whole substitutes called by the tailzie 1757, though they and their fathers had for centuries enjoyed the *spes successionis* and *jus crediti*, securing it by all the sanctions of the law of Scotland.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

“ It will be observed that, according to Lord Kenyon’s opinion, the will of 1763 must be carried into effect, whatever becomes of the procuratory 1757, and if so, there must be an entail executed in Scotland, in the parish of Logie, of lands purchased by the proceeds of the English fortune ; and as the destination under the procuratory 1757 is very different from that which takes the new acquisitions, it was plainly a matter of pure accident, whether the coincidence which Robert Henderson founds on took place in the year 1791, or should not take place for two centuries to come. And, at the same time, the moment it did take place, it seems to me that every argument now used by Robert Henderson might be used two centuries hence by the heirs favoured by the destination 1763, to compel the heir in possession of Logie under the entail 1757, to denude agreeable to the destination 1763.

“ If I am correct in this statement, it is at least a very extraordinary tenure, which it is supposed is created by the procuratory 1757, a tenure which, though guarded with great anxiety from being voluntarily defeated by the heir, is yet defeasible in all its parts, on a contingency in its nature the most uncertain, and dependent on the volition of the heir at the time. It certainly merits consideration before recognising it. It is a contingency liable to be evaded by subterfuges.

“ The defender, George Wilson, pleads that Melville could not be obliged to denude of the entail 1757 by his acceptance of the English will, because Walter Bowman having rendered the deed 1757 a title to Logie, which Melville could neither defeat nor

HENDERSON
 v.
 WILSON &
 MELVILLE.
 1802.

alienate, it was *ultra vires* of Melville to create a title in its place agreeable to the settlements 1763. The answer made to this is, that it is the will of the taillier that laid him under this obligation, and that the imposing of such an obligation implies a grant of the necessary power for performance. But this answer seems to me attended with much difficulty. *First*, The obligation created, by taking benefit under a will, to fulfil the will of the testator, is a virtual one, arising from equity, which ascribes the principles of a mutual contract to the voluntary act of accepting benefit, as importing an agreement to the condition of performing what is in our power, on the other side, to carry his intentions, as so many conditions of the grant, into execution. But what is the limit of this obligation? It certainly does not exceed the powers the legatee actually possesses, whether to discharge claims or to settle property. It does not compel him to purchase new powers like that laid on heirs by a *legatum rei alienae* in the Roman law. Lord Kenyon does not say that George Melville was bound to purchase the half of Logie, which he then supposed descended *ab intestato* to the heirs of Isabella Bowman, in order to settle it along with the other half to which he himself succeeded, in terms of the destination 1763. He was only required to settle his own half, supposed to be at his own absolute disposal.

“ Now, if a legatee is not bound to purchase powers in order to fulfil this virtual obligation, on what principle are you to raise by presumption a grant of powers from the testator accompanying this virtual obligation? If the entail 1757 is a valid and effectual deed, taking effect and vesting the heirs and substitutes in their respective interests, James Melville, without authority from the donor, had as little power to defeat it as George Melville had to defeat it, or if the succession proved intestate, to settle Isabella’s half of Logie, in terms of the will which bound himself. I apprehend the natural presumption is, that by rendering it a legal impossibility for James Melville, or any after heir, to defeat the entail 1757, the testator did not mean that they should make any attempt of that kind, otherwise he would have granted the proper power for the purpose; and, at any rate, I cannot presume a grant of powers, to extend an obligation, the natural limit of which is the actual and known

powers of the legatee. I think, farther, that the admitted accidental nature of the obligation, and presumptive powers contended for, operating at all in favour of the destination 1763, discredits extremely the presumption that any obligation, or power of such an extent, and of such whimsical consequences, were either granted or meant to be granted.

“*Second*, May it not be doubted whether the deed 1763 was competent in point of form to have conferred even an express power on the substitutes under the entail 1757, to defeat the destination therein, and establish a different and specific destination in its stead. And if it could not expressly convey such a power, it seems not easy to maintain that it should bestow it virtually or by implication, in consequence of conferring on them contingently a benefit, that bound them to fulfil the will of the tailleur so far as in their power so to do, and I think it was *inhabile* to convey it expressly, that being in fact a settlement of a Scots estate, which requires the forms of our law to render it effectual.

“*Third Point*.—Whether the deed 1757 is not revoked by the settlement 1763? This depends, *first*, on the will 1763 being sufficient in point of form; *secondly*, on its being sufficiently explicit in point of intention.

“The first of these questions settled by the decision in the case *Ochterlony v. Willocks*, decided in the House of Lords 25th March 1772, and the case, quoted in the papers, of Sir Thomas Dundas, when the whole Court, save one, were clear that an English will was of sufficient authenticity to contain an effectual revocation of a Scots settlement, and this decree was reversed, on the insufficiency of the expression of intention, not on the want of legal efficacy of the deed. Any decided act of the will, authentically expressed, by destroying or cancelling a deed, or by giving an order for that purpose, is sufficient to revoke; and I think the solemnities of the *lex loci* are the most proper for ascertaining all such acts of the will which are not settlements of property, but merely undoing what is by law in the absolute power of the granter to undo at any time. One learned Judge said, that Sir Lawrence might have granted a commission in the English form, appointing a person to take his Scots entail, and destroy it after his death. I can see no valid objection to such a commission in point of solemnities.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

“*Second.* Question as to intention.—First clear, so far at least as tending to make way for destination 1763. Entitled to take in the procuratory for this purpose as a paper marked *A de quo constat*. The only point therefore is, Whether it is a conditional revocation only? But there is nothing conditional in the expression. The not cancelling the procuratory 1757 is a slight circumstance; but I am against deciding cases on presumptions likely to be founded on nice and ambiguous circumstances. No doubt could have been entertained in 1763 as to its efficacy, so that this never could be a reason for leaving the deed of 1757 uncanceled. And here the absolute revocation goes farther to carry into effect the intentions entertained in 1763 than making the revocation conditional.”

House of Lords'
Journals.
Mar. 29, 1802.

Henderson having Appealed, “It was Ordered and Adjudged, That the several interlocutors complained of in the appeal, so far as the same concern the estate of Logie, which belonged to the late Walter Bowman, be Reversed; and Find that the succession to the said estate falls to be governed by the deed of entail executed by Walter Bowman in the year 1757: And it is therefore Ordered, That the appellant be Assolizied from the action brought against him by the respondent, Robert Henderson, and decern; and decern also in the Declarator brought by the Appellant, according to the prayer of his declarator.”

OPINION OF
LORD THURLOW.
MS. Notes.
Advocates'
Library.

LORD THURLOW, CHANCELLOR, observed,—“The interlocutor of 1795 was accurately decided, and founded on the true principles of Scots law. I read over the other interlocutors, feeling considerable prejudice in their favour from the great authority of the Judges by whom they were pronounced, and my personal respect for most of them, but without being able to comprehend the reasons upon which they are founded.

“I should have been glad to have gone more at length into the cause, if my present state of health would have permitted it, and to have examined the different cases referred to. Most of them were originally cited by the respondents. They have little to say to the real point before us, but so far as they have, they rather go to confirm the interlocutor of 1795. But I shall shortly state why I think the interlocutor of 1795 ought to be affirmed, and the others reversed.

“The clause in the deed of 1757, reserving a faculty to alter and change it, is a power to dispone anew, and not a power to ingraft a new succession upon the original settlement by an accessory deed. Such a power, exercised as it is contended it has been here, was never heard of as sustained in the law of Scotland. The counsel for the respondent being asked whether he could produce a case to this effect, admitted that he could produce no such case.

“There is, indeed, a power of nomination contained in the deed of 1757, which Walter Bowman might have exercised by an accessory deed ; but to have done so, he must have referred to the original instrument under which he exercised that power. Here there is no such reference to the deed of 1757 to render it effectual, even supposing that the reservation gives a power to ingraft a new succession by a relative instrument.

“There never was a stricter entail, so far as seen or read of, than that created by the deed of 1757, so much so, that James Melville contravened by omitting to register it. Of the same date with that deed, there was a will relative to his English estate of which I need say no more than that it was found cancelled at his death. There was also a subsequent will in 1763, but the deed of 1757 was found uncanceled.

“I agree with what was stated at the bar as to the effect of a voluntary deed like this of 1757, kept in the granter’s custody, that it was completely in his power. If he had taken infestment upon it, still being absolute fiar of the estate, he might have done what he pleased with it. But if he once published the deed, it was no longer in his power. The clause, therefore, reserving the power of revocation, and to dispone anew by an original deed of disposition, was not totally inept, since a case might happen under which a new disposition of the estate could only be made in consequence of this reservation.

“By the will of 1763, the testator desired his personal property to be laid out on lands which he directed to be settled in the manner prescribed by a deed executed of the same date. I call it a deed for the sake of perspicuity, though, not being duly executed, it is void by Statute. Now, let us see how far the one is combined with the other, so that the will can be said to refer to it. In no other way than by ordering how

HENDERSON
T.
WILSON &
MELVILLES.
1802.

HENDERSON
v.
WILSON &
MELVILLES.
1802.

the money is to be laid out in the purchase of land, and how that land is to be settled. This mention of the void deed may render it sufficient in respect of binding the property thus purchased, but it does so in no other. The consequence contended for is by no means conclusive, that because it must ingraft so much as relates to the settlement described in the will upon particular heirs, that therefore it adopts the clauses which refer to another and distinct estate. This puts an end to the idea of approbate and reprobate, for the deed of 1763, as to conveying the estate of Logie, is a perfect nullity; and though it is said that it is expressive of an intention to dispose, it is, as I have already observed, referred to by the will, only so far as to settle the land which is to be purchased with the English property.

Then it is said to be a revocation. But how can a void deed be a revocation? The operation of a void settlement can be no more to revoke than to convey. If this position were true, it would go to reverse all the interlocutors, for they all go upon the ground that the deed 1757 is an existing deed. The attempt to fetter it by the instrument of 1763, I consider as very idle. In all Courts of Justice, but especially in Scotland, where written instruments are peculiarly sacred, it is of the greatest importance that they should be construed by fixed rules of interpretation. If we once depart from principles or the established rules of law under notion of some peculiar hardship, it will be impossible to know what estate parties are to take under a conveyance. I don't mean to pass any particular reflection on the administration of justice in the Courts in Scotland. The same thing has in some respects taken place in this country; for, as old Wilbraham used to say, —'No man could tell what a will was, until it got to the House of Lords, owing to strained niceties and refined interpretations.' The old Scottish law was very simple in its regulations as to heritable property, and there was no place in which titles were more secure. I cannot but say, however, that modern decisions have very much departed from that ancient simplicity.

"I therefore move—That the interlocutors complained of be reversed, that the interlocutor of 1795 be affirmed, and that the appellant be assoilzied from the conclusions of the action

brought by the respondent, and that it be decerned for him accordingly in the declarator brought by him."

HENDERSON
v.
WILSON &
MELVILLES.
1802.

1. The Notes given of Lord Thurlow's opinion in the case of *Henderson v. Wilson and Melvilles* were taken by Mr. Mundell, the solicitor for Wilson, the appellant in the House of Lords, and given by him to Mr. James Chalmer, the solicitor for Henderson, the respondent. Mr. Thomson, his agent in the Court below, received them from Mr. Chalmer. A copy of them was made in 1815, by the late Mr. J. A. Maconochie, Advocate, and is preserved along with his father, Lord Meadowbank's, Session Papers in the Advocates' Library.

2. There is also preserved in the same collection a copy of a letter from Mr. Solicitor-General Blair, afterwards Lord President, to Mr. Thomson. The letter is dated February 14, 1801, and is as follows: "I have at length perused the appeal case which you sent me some time ago. You say that Mr. Chalmer thinks the judgment wrong; but I really should not have discovered this from reading the case, as I do not recollect any argument on our side of the question which is not fairly brought into view. I still continue of my former opinion, that the substantial merits of the case are with us, and that the judgment cannot be altered without encroaching upon

the principle which was laid down in the case of *Cunningham v. Gainer*, although I do not much approve of the wording of our interlocutor, which, if I remember aright, was the operation of the head of our Court, whose notions upon the subject appeared to me a little singular. If the House of Lords shall not be disposed to affirm the judgment as it stands, I hope they will find sufficient ground for throwing aside all the settlements, so as to make an intestate succession, in which case, I see from the pedigree, that our client will come in for one half."

3. The case of *HENDERSON v. WILSON* is sometimes cited as an authority for the proposition, that a settlement of heritage cannot be revoked by a deed improbativ by the law of Scotland, although probative by the law of the place where it is executed. It is, however, no authority on this point, as there was no express revocation of the prior settlement, and it therefore fell to be regulated by the rules applicable to an implied revocation. This view is consonant with the opinion of LORD FULLERTON in the case of *LEITH'S TRUSTEES v. LEITH*, January 6, 1848.

4. In that case, LORD FULLERTON observed,—“Revocation may

be of two kinds. One when without any express recall of the former deed, the granter executes another essentially inconsistent with it; for instance, conveying to a particular disponee heritage which he had by a prior deed conveyed to a different party. The effect of this, which is sometimes termed an implied revocation, will of course depend on the efficiency of the second conveyance; and in the case of Scottish heritage, if this second deed is defective in any of the forms requisite to support a disposition of heritage by the law of Scotland, the first deed will remain effectual. Without embarrassing ourselves with the authorities of the civil law on this point, I think we may safely hold, that by the law of Scotland a revocation of this kind is not effectual, unless the deed from which it is implied be effectual to convey the subject of conveyance to the new disponee. The disposer, though intending to prefer the second disponee to the first, is not held absolutely to extinguish the right of the first disponee, and so to let in the heir-at-law in the event of the second deed failing of effect. In cases of this kind, then, the efficacy of the second deed as a revocation must depend on its efficacy as a conveyance, and in this sense it may be said that a revocation, in order to be effectual,

requires to be executed in such a way as to be capable of affecting Scots heritage.

5. "Accordingly it rather appears to me that this was the principle on which some of the cases referred to, such as that of *HENDERSON v. WILSON* and *MELVILLES*, and some others, were decided. In those cases there was no express revocation, and there could be no question of the effect of such revocation. Thus, in the case of *HENDERSON v. MELVILLE*, the Court here had found, that the second procuratory, though improbativ, was a sufficient declaration of the granter's will in the exercise of his reserved powers, and that the first procuratory was effectually revoked. This judgment was reversed by the House of Lords, and the reversal is an express authority for the proposition already mentioned, viz., that a second deed purporting to convey heritage, will not be held by the mere force of implication to revoke a former conveyance, unless such second deed be probative, and, consequently, effectual for its purpose. But that authority, and others of the same kind, do not touch the present question, which arises on the effect of an express revocation, or a clause which is held by the defender to be equivalent to an express revocation."

An express Revocation of a prior Settlement in favour of a Stranger contained in a subsequent Conveyance to another Stranger executed on Deathbed, restores the right of the Heir of Investiture.

CRAWFURD v. COUTTS.

IN 1771, Colonel Crawford executed an entail of his estate of Crawfordland in favour of himself in liferent, and the heirs-
male of his body ; whom failing, to Hugh Crawford of Jordan-
hill, and the heirs-male of his body ; whom failing, to other
substitutes.

March 14, 1806.

NARRATIVE.

The deed contained a clause reserving power to the granter, " at any time of his life, *et eliam in articulo mortis*, to alter, innovate, annul, and make void these presents, either in whole or in part, and to infringe upon or totally change the foresaid series of heirs, or course and order of succession above devised."

In 1793, Colonel Crawford, while on deathbed, executed a gratuitous disposition of the same lands in favour of Thomas Coutts. This deed contained the following clause :—" And I hereby revoke and recall all former dispositions, assignations, or other deeds of a testamentary nature formerly made and granted by me, to whatever person or persons, preceding the date hereof, and particularly a deed granted by me in the year 1771, settling my estate upon Sir Hugh Crawford, Bart. of Jordanhill, and his heirs ; and I declare the same to be void and null, so far as these deeds are conceived in favour of the persons to whom they are granted, but to be valid and sufficient to the extent of the powers therein reserved to me, to revoke, alter, or innovate the same, to the effect only of making these presents effectual in favour of the said Thomas Coutts and his foresaids."

Colonel Crawford died six days after the execution of this deed. Mrs. Elizabeth Crawford, his heir-of-line, brought a reduction of both settlements, contending that the deed 1771, in so far as it was conceived in favour of Sir Hugh Crawford and the other strangers thereby called to the succession, was revoked

CRAWFORD
v.
COUTTS.
1806.

by the deed 1793, and that this last deed fell by the law of deathbed.

ARGUMENT FOR
THE HEIR.

PLEADED FOR THE HEIR.—When a *liege poustie* deed is effectually revoked, a deathbed deed, made under cover of a reserved power in the *liege poustie* deed, is liable to be reduced, if it is to the prejudice of the heir-at-law.

By the deed 1793, the prior settlement, which excluded the heir-at-law, was recalled, and the new conveyance contained in that deed is liable to reduction *ex capite lecti*. The heir does not take the estate under either of the deeds. He takes it in virtue of his right as heir-at-law. There is no room, therefore, for the doctrine of approbate and reprobate.

It is possible that a person may in a deathbed deed so qualify his revocation of the *liege poustie* deed as to protect the deathbed deed from challenge. A deathbed deed, after recalling the *liege poustie*, may contain an express provision, that if the second deed shall be reduced on the head of deathbed, or any other ground, then the revocation shall be void, and the original deed stand good. In such a case, it might be held that the heir had no interest to reduce the deathbed deed, because the only consequence of his reduction would necessarily be to keep alive the *liege poustie* deed by which he was equally excluded. The more accurate conveyancers, however, do not use words of revocation at all, but merely declare, that if the new deed shall from any circumstance become ineffectual, the former conveyance shall stand good. There is, however, no such qualification or declaration in the present case.

ARGUMENT FOR
DISPONEE.

PLEADED FOR THE DISPONEE.—If a person make a disposition of his heritage in favour of the heir, who is *alioqui successurus*, and if the disposition contain a power to revoke or alter at any time, *etiam in articulo mortis*, the reserved power cannot be exercised upon deathbed to the prejudice of the heir. The reason of this is, that the right of the heir was previously entire, and could not therefore be cut off by a deed executed on deathbed.

When, however, a person has in *liege poustie* executed a disposition in favour of a stranger, *i.e.*, any person other than the

heir *alioqui successurus*, containing a power to revoke or alter, the reserved faculty may be exercised at any time, *etiam in lecto*, so as to enable the granter to convey the estate to any other person whom he chooses. The reason of the difference in the two cases is obvious, from the principles upon which the law of deathbed is founded. By the *liege poustie* settlement in favour of the stranger, the right of the heir is completely cut off. A revocation, therefore, and a new disposition executed on deathbed cannot be challenged by the heir, for it is not to his prejudice, his right having been previously destroyed by the *liege poustie* disposition. Neither can the donee under the prior settlement challenge the new deed, for the right of reducing upon the head of deathbed is a privilege which does not belong to the donee, but belongs solely to the heir. It is not the object of the law of deathbed to protect the donee.

CRAWFORD
v.
COUTTS.
1806.

When a disposition is executed in *liege poustie* in favour of a party not *alioqui successurus*, the right of the heir is entirely at an end. The reserved power may be exercised in his favour, but it can never be exercised to his prejudice; for his right having once been cut off, it is of no consequence to him in what manner the estate, which has already been disposed to a stranger, shall be afterwards burdened or conveyed.

The plea that the second deed consists of two separate and distinct parts, and that it may be held as a valid deed in so far as it revokes, and at the same time as an invalid deed in so far as it conveys, cannot be sustained. The revocation of the former deed and the new *institutio heredis* are *partes ejusdem negotii*. The one cannot subsist without the other, nor be separated from it. The revocation was a necessary step towards making the new *institutio heredis* effectual. It was made only *eo intuitu*, and it never would have been made at all, except with that view. If, therefore, the new *institutio heredis* is not effectual, neither can the revocation be effectual. It is not an absolute and unqualified revocation made for the sole purpose of excluding the former donee. It is merely a qualified and conditional revocation, to make room for a new donee whom the granter preferred to the former one. The former disposition of 1771 was revoked "to the effect only of making these pre-

CRAWFURD
v.
COUTTS.
1806.

sents effectual in favour of the said Thomas Coutts and his
foresaids."

JUDGMENT.
June 12, 1795.

The Lord Ordinary Reported the case to the Court, and the
Court "Assoilzied the defenders."

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

On the Session Papers, LORD PRESIDENT CAMPBELL has
written,—“Deathbed. Reserved faculty. The doctrine of re-
served faculties, and of exercising them on deathbed, while the
prior deed has been in favour of one not *alioqui successurus*,
is now very well established and understood. See the Appeal
case for the respondent in the Douglas cause, 1779. The heir
called by such deed cannot object to the condition under which
he is called, and the heir-at-law or heir of the investiture being
excluded by the prior deed in *liege poustie*, has no interest, and
therefore no title to object.

“It is said that the pursuer in this case was not entirely ex-
cluded by the deed 1771, having been called in the last place,
under the description of heirs and assignees whatsoever, and
that it was not in the power of Colonel Crawford, by the death-
bed deed, to deprive her at least of this chance. This, however,
is but a very remote interest, and has not been much attended
to in such cases; heirs and assignees implying in its nature a
fee-simple, and not properly a destination of succession. It is
the usual termination of every deed of settlement, meaning only
that the heir-general is to take before the King as *ultimus hæres*,
and it cannot be considered as a clause of return.

“As to the clause of revocation contained in the deathbed
deed, this will have its effect upon the supposition that the
settlement containing it is effectual, but not otherwise. Such a
clause is in its nature conditional, unless the contrary were ex-
pressed in very clear terms. See the argument in the case of
Montgomery v. Fowlis, now in the roll.”

Nov. 17, 1795.

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

The Heir-at-law having Reclaimed, the Court “Adhered.”

On the Session Papers, LORD PRESIDENT CAMPBELL has again
written,—“See former Notes. There are cases in which a deed
may be effectual in part, and set aside in part; *e.g.*, a will be-
queathing both personal estate and heritage may be good as to
the first, and bad as to the last. Or a deed disposing of per-

sonal estate may be set aside as to the *legitim*, and be sustained as to dead's part. But even in these cases, the same party cannot both approbate and reprobate.

CRAWFURD
v.
COUTTS.
1806.

"In the case of a deed containing a revocation and settling of new, it may depend on circumstances whether it can be divided or not. See Notes on case of Henderson and Wilson, January 31, 1797. It may be so conceived as to be clear either way. It may say expressly—This shall in all events stand as a revocation, whether it be good or not as a settlement; or it may say the contrary. But supposing it not to be explicit one way or other, we ought rather, *in dubio*, to presume that the whole deed was meant to stand or fall together.

"In the present case, the language of the deed favours very much this supposition, and therefore the heir-at-law still remains excluded. One or other of the deeds must take effect, and it is *jus tertii* for the pursuer to maintain that the first shall, and not the second. The case is just the same with a virtual revocation. See the English case in the Information for Coutts.

"Although the law of deathbed was salutary when first introduced, the reasons in support of it are not so strong now, and it is but a partial remedy at best, as it does not reach personal estate. No occasion to stretch it. The doctrine of the decisions is the result of two distinct propositions, both of which are well founded in truth and justice. English money-lenders have been advised to rely on this. See opinion for Bankers, &c., by the late Lord Justice-Clerk Braxfield. Impossible to distinguish between heritable debts and land. Adjudications and wadsets partake of the nature of both property and debt.

"When one makes a deed in favour of a stranger in *liege poustie*, it is not to be presumed that he does this merely with the view of eluding the law of deathbed. He knows that he may die suddenly, without having the opportunity of making another. He therefore seriously means to prefer the person called, but reserves a power of changing him for another, *quandocunque*."

The Heir-at-law having Appealed,—“It was Ordered and Ad-
judged, That the cause be remitted back to the Court of Session

House of Lords.
Remit.
July 11, 1799.

CRAWFURD
v.
COUTTS.
1806.

OPINION OF
LORD ROSSLYN.
Bligh's Reports,
Vol. ii. p. 655.

in Scotland ; and that the said Court do rehear the parties upon the interlocutors complained of in the said appeal."

LORD ROSSLYN, CHANCELLOR, observed,—“ The hearing at the bar upon this cause was had some time ago, and I have now to state the result of the opinion I have formed upon it. The more I have considered this case, the more I have felt the difficulty and importance of it. I had the advantage of trying my own opinion by communications with persons conversant in the law of Scotland, who were present at the hearing, with a noble and learned Lord, Lord Thurlow, who perused the printed cases, and with a Judge of the Court of Session, who was not raised to the Bench when the judgment now appealed from was pronounced. I had verbal communication also with other persons, and I was favoured with the result of the opinions they had formed.

“ These opinions were not uniform. If they had all gone in one course, I should have deemed that the safe mode for you to have followed in determining this cause, though it had differed from my own sentiments. It is proper to state, that the learned Lord I alluded to concurs with me ; and that our opinion is, that the judgment in the present case is contrary to law. At the same time he feels, as I myself do, much difficulty in a question purely of Scots law upon such opinions as we can form, to state it as advisable to reverse the judgment of the Court of Session.

“ I shall mention in a few words the nature of the present question, to show the importance of it, the grounds upon which the decision proceeded, and the nature of my doubts with regard to it ; and I shall then submit what I conceive is proper to be done in the present case.

“ The facts in the cause are short. Colonel Crawford possessed an estate, which he destined by deed, several years ago, to Sir Hugh Crawford, who was not his heir. This deed remained in Colonel Crawford's hands undelivered ; but if he had died without executing any other deed, no doubt the estate would have gone to Sir Hugh. He reserved a power, however, to alter the deed, in whole or in part, *et etiam in articulo mortis*.

“ This reservation referred to a point in the ancient law of Scotland, which I have always looked up to as of great excel-

lence ; and I have read cases where it was treated with great respect by Lord Hardwicke. By that law, no deed is valid against the heir, if executed on deathbed, that is, if the granter be attacked with the sickness of which he dies, and does not survive a certain number of days. In the argument stated in the printed cases, it was held out that this was a personal privilege in favour of the heir-at-law, a regulation for his benefit alone. But, in my opinion, this comes far short of the excellence of the regulations ; it is also highly favourable to the dying man, that his last moments should not be disquieted. It was, perhaps, at first intended to put a stop to the granting legacies to the church and to charities, which prevailed so much in those days ; it now prevents the mischiefs that might arise from deeds obtained by besieging a person when near his death.

CRAWFURD
v.
COUTTS.
1806.

“ The heir has a right to set aside all deeds executed contrary to this regulation. It appears in the present case, that Colonel Crawford entertained a purpose that Sir Hugh Crawford, in whose favour he had made the former deed, should not succeed to his estate ; and that he also had the intention, when in a declining state of health, to leave it to a very respectable gentleman, an old and intimate friend, perhaps his relation. By him it was neither asked nor expected ; and when I mention, that this was Mr. Coutts, the respondent in the present appeal, I need not add, that he could be supposed to want it but little. Without communication with Mr. Coutts, he revoked the disposition in favour of Sir Hugh, and by same deed conveyed one of his estates to the former.

“ After Colonel Crawford’s death, the appellant, his heir-at-law, claimed his estates, if no person could show a better right to them. For this purpose, she brought an action before the Court of Session for setting aside the disposition to Mr. Coutts as void, being granted on deathbed ; and contending, that the pretended sale of the other estate was invalid, being a mere fiction. She called Mr. Coutts and Sir Hugh Crawford as parties, but the latter was entirely out of the case. The only title he could make was through the deed which had been revoked. He, however, founded upon this, that it was the intention of the deceased that he should take the estate if it did not go to Mr. Coutts. But the deed in his favour was revoked in the most

CRAWFURD
v.
COUTTS.
1806.

marked manner, and all intention as to him was clearly gone. When the question was agitated with regard to the estate which was the subject of the fictitious sale, Sir Hugh having stated his argument, that if his deed was not revoked that estate must belong to him, the Court found that the heir was entitled to it, the deed to Sir Hugh being expressly revoked.

“ That determination was posterior to the decision which forms the subject of the present appeal in the other part of the cause, and Sir Hugh’s argument, in some degree, arose out of that decision. The Court then held the ground of giving the estate to Mr. Coutts, by some confused mode of reasoning, to be of this nature: ‘ It is true an heir-at-law has a right to set aside deeds executed on deathbed ; but what right have you in the present case ? Sir Hugh must take in preference to you though his deed was revoked ; it was a revocation only to the purpose of validating the deed in Mr. Coutts’ favour. Sir Hugh is a bar to you ; but as the intention of the deceased was not in his favour, therefore Mr. Coutts’ right is against him.’

“ The Court then added a good deal of reasoning upon the decisions which had been pronounced. In one of these, about twenty-five years ago, there occurred a case, *Rowan v. Alexander*, 22d November, 1775, where a person possessed of two estates, A. and B., by one deed conveyed both estates to certain disponees ; and by a second deed executed on deathbed, he conveyed the estate B. to certain other persons. Lord Auchinleck, a respectable Judge, before whom this matter was first argued, held, that the heir-at-law was entitled to the estate B., and that the deathbed deed, though ineffectual as a conveyance, was sufficient as an *implied revocation* of the former deed with regard to that estate ; and he supported the first deed as to the other estate.

“ This judgment was altered by the Court upon an appeal to them ; and it was determined that the deathbed deed was effectual, on the ground that the heir was cut off by the first deed, of which there was no express, but merely an implied revocation, by the subsequent disposition of the estate B. on deathbed ; and that if the deathbed deed was not to subsist, the prior deed would be effectual. The Court of Session here made a distinction between an express revocation and an implied one, which I

confess I do not feel. If a person makes a disposition of his estate, and locks it up in his repositories, and at the distance of ten years makes another disposition of the same estate, I should be of opinion that the former deed was revoked, and that the posterior one must take effect.

CRAWFURD
v.
COUTTS.
1806.

“ Another distinction was taken in the present case, namely, that though Colonel Crawford being on his deathbed could not execute a valid disposition of his estate, yet he could still execute the reserved power to alter contained in his former deed, and which he charged on Sir Hugh Crawford the volunteer. My objection to this is, that such a reservation cannot be allowed. A man may reserve a power to charge his disponent, whose sole right being founded on the disposition, he cannot object to any part of it. But what is the nature of the reservation made by Colonel Crawford? It is a reservation of a power to do on deathbed what the law says he shall not do in that situation. He might reserve a power to alter his former disposition at any time of his life, which was a reservation against the disponent, but he could not reserve a power against the heir-at-law, to do a deed which was contrary to law.

“ I may illustrate this by mentioning an instance where Lord Hardwicke determined a similar question upon a similar point of law. A person conveyed her estate to her daughter, an infant, with power to dispose of the same during her minority, or to devise it by will for certain purposes. The daughter was a grown infant, and under coverture. After the mother's death, the infant's husband got her to grant a conveyance to his creditors, which was a different purpose from those pointed out by the mother. The daughter afterwards devised her estate by will, and died before her age of twenty-one years. It was contended in this case, that though the daughter was an infant, yet what she did in execution of the power granted by her mother must be held valid. Lord Hardwicke appears to have been at first caught with this argument, but he was clear that the powers mentioned in the mother's conveyance were contrary to law; and though an infant of twenty years had a greater capacity of mind than one of tender years, yet by law they were under the same disabilities. The same mode of reasoning applies to the case now before us.

CRAWFURD
v.
COUTTS.
1806.

“It appears that the judgment of the Court below must have proceeded on a fallacy. The deed in favour of Mr. Coutts being executed on deathbed was a nullity ; the deed in favour of Sir Hugh was also a nullity, because it was revoked, both expressly and by implication. But the Court, in some singular way, by splicing these two nullities together, which taken singly were of no effect, formed a deed carrying off the estate from the heir, though against a positive law.

“The respondent founded part of his argument upon what is termed in Scots law the maxim of approbate and reprobate. Says Mr. Coutts, ‘If you approbate the revocation of the deed to Sir Hugh, contained in the posterior deed in my favour, then you cannot reprobate the other clause of that deed.’ But this is false reasoning. The Court cannot say to the heir-at-law, Under what deed do you claim ? It is enough for her to say, God and nature have made me heir-at-law ; show me by what deed my right is cut off. The title of an heir-at-law is always complete, insomuch that a conveyance or devise to such heir in fee is held null, and of no avail. The law of England in such a case says, the heir is in by *descent*, and not by *purchase*.

“Having stated so much of the argument in the present case, I must now mention the doubts that have occurred to me upon the subject. I cannot concur in the judgment which has been pronounced ; and if I had been sitting as sole Judge in a court of law, bound to act according to the dictates of my conscience, I must have determined against the judgment of the Court below. But the case is different here : when I am to state what I conceive is fit to be done, I cannot arrogantly direct that my opinion should be held better than that of the Court of Session, and on a point of Scots law of great importance to the public, assert that they have been mistaken.

“A matter, which which I have yet to mention, appears to have biassed the Court considerably. Within these last twenty-five or thirty years an attempt has been made to remedy an inconvenience in conveyancing, which was a good deal felt. In Scotland every security on real estate is itself real. Persons in this country having money to lend are informed that the titles to estates in Scotland are clear, and that interest is there well

paid ; but they are staggered when they learn that they cannot dispose of such securities by will. A desire at first prevailed to have this matter settled by Act of Parliament, but it was not effected. The present Lord President of the Session, and the late Lord Justice-Clerk, who was eminent for his knowledge in conveyancing, thought they could do away this difficulty, and still make a good security by creating, and so reserving, a power to devise by will. I am apprehensive that the decision in this case would involve questions relative to the securities so vested in trustees, and therefore I feel the more delicacy with regard to it where the consequences might be so widely extended and so disagreeable.

CRAWFURD
v.
COUTTS.
1806.

“ I have considered this point along with the noble and learned Lord already alluded to, and we agree in opinion, that it should be regulated by an Act of Parliament, declaring that money secured on real estates should still be considered, and be devisable, as money, though descendible to the heir-at-law, as in mortgages in fee in this country.

“ Upon the whole, my opinion is, that the case should be remitted to the Court of Session, with a direction to them to reconsider their judgment. I think a further consideration of it may open and enlarge the views of the Court ; for upon a part of the cause subsequent to that now appealed from, they preferred the heir-at-law, and they must then have entertained an idea of the case which was not consistent with their former decision.”

A rehearing having taken place in the Court of Session, and the parties having given in Memorials, the Court pronounced the following interlocutor :—“ The Lords having resumed consideration of this cause, and, in obedience to a remit from the most honourable the House of Lords, again heard counsel for the parties upon the interlocutor complained of in the appeal to the most honourable House, and having advised the mutual Memorials for the parties, they Adhere to the interlocutor as-soilzing the defenders from the reduction, in so far as concerns the lands of Crawfordland, and discern.”

Judgment on
Remit.
Feb. 8, 1801.

LORD MEADOWBANK observed,—“ It is of little consequence as to future settlements, because the question may be obviated

OPINIONS.
MS. Notes.

CRAWFURD
r.
COURTS.
1806.

OPINIONS.
MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

by more accurate expressions. But it is of consequence as to past deeds. The object here is, to take advantage of a critical inaccuracy in the clause in question. I am for adhering."

LORD POLKEMMET observed,—“ I have been all along against the interlocutor. A party may no doubt disinherit his heir in *liege poustie*, but that supposes a deed *inter vivos*, which is to continue effectual, though it reserved power, or even a *mortis causa* deed, if it is to remain the subsisting deed under which titles are to be made up. But when it is cancelled or totally annihilated, so as to bring the deathbed deed to be the only subsisting one, then the heir-at-law may step in, because nothing excludes him except the deathbed deed alone. In the present case, the evidence is strong to point out that Sir Hugh was excluded in all events. The *liege poustie* deed is left as a blank, and good for nothing. No titles can be made up on it. But if we can set up the deed 1791 at all, it would be as a mere trust, not excluding the heir-at-law."

MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

LORD JUSTICE-CLERK ESKGROVE observed,—“ I am for altering. A stranger is a mere donee. Power of revocation not necessary as to him. It is only necessary to extend the granter's power against the heir, and in face of law of deathbed. True, that the heir must have an interest. But here the interest arising from the revocation is plain. There is nothing in the clause bringing back the estate to Sir Hugh Crawford. Suppose the former deed cancelled, or thrown into the fire. A man may express his meaning in plain terms." *Rowan v. Alexander*, Lord Alemore's opinion.

OPINIONS.
MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

On the Session Papers, LORD PRESIDENT CAMPBELL has again written,—“ It has been supposed that this is a complex and an intricate question upon the law of deathbed, and peculiar to the law of Scotland, that the argument in support of the former judgment is obtuse, and involving in it some degree of inconsistency, and that the law of deathbed is in danger of suffering if the judgment is adhered to.

“ But when the real nature of the question is clearly understood, it will be found, that although it involves in it a point relative to the peculiar law of deathbed, it is truly of a more general nature, in so far as it arises upon the construction of different deeds, and where we must resort to the common legal

rules of construction, in order to find out the import and effect there, the deeds themselves not being at one, and objections being set up which are said to strike against their validity, but not in whole, no matter whether arising from deathbed, or from any other ground in law or fact.

CRAWFURD
v.
COUTTS.
1806.

“It is believed that many such questions are to be found in the English Reports, as well as in ours. See Cases in Equity Abridged, vol. i. p. 408 ; vol. ii. p. 776. In all such cases where we have different and contrary deeds, and perhaps conflicting rules of law to consider, and different interests to attend to, we are necessarily called upon to inquire what was the will, and what were the powers of the maker of such deed,—what did he intend, and what has he actually done ? What had he a right to do, and what have the contending parties an interest and a right to demand ?

“This is precisely what occurs here ; and in whatever way the determination may be given, the peculiar law of Scotland with respect to deathbed will remain just as it did before, without being in any place affected by it. The one party pleads upon the law of deathbed ; the other admits that law, but says, that this case is not within it, and denies the right of the pursuer to make it a deathbed question. Whether it is or is not, your Lordships will determine upon a fair examination of the deeds founded on.

“Before taking a minute view of the deeds, let me say a word or two upon a general topic which has often been the subject of discussion in such cases as the present, viz., upon the effect of a clause reserving a power to alter, &c., *etiam in articulo mortis*. It is properly enough observed in the pursuer’s memorial, that clauses of this kind are often of very little significancy one way or another. In the present case, when the deed remained within the granter’s power to the last moment of his life, and the fee of his estate also in him, this clause did neither good nor harm ; for, supposing there had been no such words in the deed, I am of opinion that Colonel Crawford could have done exactly what he did with the supposed help of these words, because there was nothing done to take such power out of him.

“Clauses of this kind are meant for a different case, viz., where the granter divests himself of the fee, and ties himself up in

CRAWFORD
v.
COUTTS.
1803.

some other shape, *e.g.*, by contract of marriage. He may do this either absolutely, or attended with the quality or condition that he shall nevertheless have a reserved faculty or power to make alterations or to impose burdens, and for the most part these words *etiam in articulo mortis* are added.

"It is on all hands agreed that the addition of these words will have no effect, if the heir *alioqui successurus* has not been excluded by any act done, or deed executed in *liege poustie*. How far they can affect a stranger called in to the succession under that precise quality, is a different question ; and when this question first occurred, it must have been attended with some doubt and difficulty, not as between the heir *alioqui successurus* and the heir pleading on the deathbed deed, but between the person called by the *liege poustie* deed and the latter, for it is very plausible to say that no man can by any clause of this kind, or by any figure of words, assume to himself the power of dispensing with the law by doing what the law prohibits him from doing, viz., disposing of his heritage on deathbed, and therefore, that this condition ought to be held *pro non scripto*, or to be so limited as to admit of alterations only when executed *debito tempore*, before the granter comes to be on deathbed ; and further, that this person, although a stranger, who is called in to the succession, vesting in him a certain right of fee defeasible only by lawful deeds, must now be considered as the heir *alioqui successurus*, and ought not to be thrust out again by any deed on deathbed.

"The contrary argument, however, has uniformly prevailed in such cases, viz., that a stranger called in to the succession in this qualified manner must give way to the qualities and conditions under which he is called, and is not entitled to challenge the exercise of them, even in *articulo mortis*. He has no other way of getting at the estate but by claiming under that very deed, and he cannot be allowed to approbate and reprobate, *i.e.*, to play fast and loose with one and the same deed. It is against the stranger heir, not the heir-at-law, that such a clause is pointed.

"Such would have been the question with Sir Hugh Crawford, had the fee been put in him by the deed in 1771. We are apt to startle at reserved powers to alienate on deathbed

CRAWFURD
v.
COUTTS.
1806.

and yet, unless we resolve at once to depart from all the authorities and decisions on this subject from the beginning, we could not, in the supposed case, have decided in favour of Sir Hugh. But the present case is attended with still less difficulty, as Sir Hugh never had the smallest hold of this estate in any manner or way, Colonel Crawford himself remaining, by the deed 1771, in the fee of his estate, and likewise in possession of the instrument itself, which was locked up in his repositories, and therefore at the sole disposal of the granter at any period.

“Accordingly, Sir Hugh has not been advised to compete with Mr. Coutts, or in other words, it is admitted that Colonel Crawford had a right to take this hope of succession from Sir Hugh, and to give it to another stranger in preference to him, even upon deathbed.

“But now the heir-at-law steps in, and says, that since you have excluded Sir Hugh by laying aside the deed in his favour, you must also lay aside the other deed claimed on by Mr. Coutts, for the deed being thus revoked, and the other liable to the objection of deathbed, you cannot join two nullities together in order to make an effectual settlement in favour either of the one or the other of these gentlemen to carry off the estate from the heir-at-law, whose right, it is said, is always complete, insomuch that a conveyance or devise to such heir in fee is held null.

“This last observation seems to be grounded upon some principle in the law of England, which has no existence with us. But be that as it will, the argument thus used for the heir-at-law seems to depend altogether on this, Whether, in a question with the heir-at-law, we can give an effect to the deed 1793, essentially different from what we give to it in the question with Sir Hugh Crawford?

“It assumes the very proposition which requires to be proved, and which has never yet been sanctioned by any authority or decision in such a case, viz., that one and the same party is entitled to set up two contradictory pleas upon one and the same deed, viz., that it shall be held as a good and valid deed to one effect, and null to another; that it shall be sustained so far as it is favourable to his views, and set aside so far as it is prejudicial to them.

CRAWFURD
v.
COUTTS.
1806.

"The short question is, Whether the revoking part of the deed can be held as independent, as executed with a view to intestacy, and whether it can attain that object alone, while the deed itself very clearly expresses, that it was done *alio intuitu*, viz., to make way for another stranger heir, and for no other purpose or object whatever? The words of the revoking clause itself, as well as the new settlement in favour of Mr. Coutts, leave not the smallest room to hesitate about this. The revoking clause must be taken along with the context.

"The question is well put in the memorial for Mr. Coutts,—Whether Colonel Crawford might not have explicitly said in his deed, that it was not his intention to revoke the deed 1771 in favour of Sir Hugh, unless to devolve the succession in favour of Mr. Coutts, and if the last object could not be obtained on account of the law of deathbed, or for any other reason, it was his determined will, that Sir Hugh should still be the heir, and that in all events, his heir-at-law should remain excluded, would there have been any room for the claim now made by the heir-at-law? And if so, is the language of this deed less strong, and the real import of it less clear, than in the case supposed?

"The reasoning in the two English cases above noticed is very strong to this effect, and so are some of the decided cases with us. Case of Kerr. Kilkerran, p. 153. Henderson v. Wilson, 31st January 1797.

"Such clauses of revocation are in their nature conditional. It is not giving them fair play to hold them as independent deeds, unless it were so expressed in clear terms. The proper way of declaring this is by a separate deed, or by a revocation upon the back, or cancelling; and then if another deed is executed, not *incontinenti*, but *ex intervallo*, there may be some farther claim of the heir-at-law. Here it was all *pars ejusdem negotii*. Suppose Colonel Crawford had ordered Sir Hugh to make over nine-tenths of the succession to Mr. Coutts, or to pay him a sum nearly equal to the value of the succession. Or suppose he had not put in an express revoking clause, but had done the same thing virtually by settling of new. In all these cases it is admitted that the deed would have been good. Yet these may as well be said to be devices, and the law of deathbed is as much affected by them as in the present case.

“The short answer in all such cases is, that the proprietor is exercising his legal right, and that the heir is hurt not by the deathbed deed, but by the deed in *liege poustie*, against which no law operates. And there is no danger that any man will, in *liege poustie*, call a stranger into his succession, with no view of favouring that person, but using him as a cover to let in another upon deathbed, for it is more than an equal chance that he will die before executing this plan.

CRAWFURD
v.
COUTTS.
1806.

“The judgment in short already pronounced, is the necessary result of two distinct propositions, both of which are unquestionably true, viz., *First*, That the heir may be excluded in *liege poustie*. *Second*, That he has no interest, and consequently no title, to find fault with a deed which is not to his prejudice. It is a strong measure to divide and garble a deed. It ought rather to be presumed *in dubio*, that the whole was meant to stand or fall together. The judgment with regard to Monklands is perfectly consistent, being founded on this, that the deed 1793, contains merely a revocation as to the property, and does not dispose of it, and therefore the party who founds on this revocation, does not approbate and reprobate.”

The Heir-at-law having again Appealed, the following judgment was pronounced by the House of Lords :—“The Lords find, That in this case the question, Whether the heir hath a title and interest to challenge the deed of 1793, as made on deathbed, depends upon the particular nature and effect of the several deeds executed by the late Colonel Crawford, and especially on the nature and effect of the deed of 1793, regard being had to the particular terms of that deed, as expressing the same to be a Revocation and recalling of all former dispositions ; And find, That the deed of 1771, though executed in *liege poustie*, ought not to be considered as being at the death of Colonel Crawford such a subsisting valid instrument or disposition executed in *liege poustie*, as that thereby the interest of the heir to challenge the deed of 1793, as to the lands by the same deed disposed to the defender Thomas Coutts, should be deemed to be barred, inasmuch as the latter deed contains, in terms the most express, Revocation of all former dispositions, assignations, or other deeds of a testamentary nature, formerly

JUDGMENT.
House of Lords'
Journals,
March 14, 1806.

CRAWFURD
v.
COUTTS.
1806.

made and granted to whatever person or persons preceding the date thereof, and particularly of the deed granted in the year 1771, and contains the most express declaration in terms, that such deeds are to be void and null so far as they are conceived in favour of the persons to whom they are granted : And also find, That although the deed of 1793 contains a declaration that the former deeds should be valid, and sufficient to the extent of the powers therein reserved to revoke, alter, or innovate the same, to the effect only of making the deed of 1793 effectual in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication rendering such former deeds valid or effectual beyond the extent in which they are in express terms declared so to be, or to be made the ground of a construction, whereby such former deeds should be held to be valid, or sufficient in any respect in which they are by the same deed, in express terms, declared to be null and void : And find, That although such declaration was made in the deed of 1793, asserting the validity of the former deeds to the extent of such powers, all the dispositions in the former deeds having been revoked in express terms, there did not, according to the true effect of all the deeds taken together, at the death of Colonel Crawford, under any parts of the former dispositions so expressly revoked, and so expressly declared to be null and void, exist in any persons named in such former deeds, any personal or other right in the lands by the deed of 1793, disposed to the defender, secure against the challenge of the heir *ex capite lecti*, on which the disponent *in lecto* under the deed of 1793 could be entitled to found as his defence against the reduction of the deed made *in lecto* : And find also, That as the deeds in this case are conceived as to the terms thereof, the disponents under the deed of 1793 cannot be considered as having title or right under the former dispositions, as if they had been named therein, or otherwise under the effect thereof : And find, likewise, That the heir is not excluded in this case from challenging the deed of 1793 *ex capite lecti*, and at the same time founding thereon, as revoking the former dispositions : And it is therefore Ordered and Adjudged, That the Interlocutors complained of, so far as they are inconsistent with the Findings and Declarations aforesaid, be, and the same are hereby Reversed : And it is

further Ordered, That the Cause be remitted back to the Court of Session in Scotland, to do therein as shall be meet, regard being had hereunto."

CRAWFURD
v.
COURTS.
1806.

LORD ELDON observed,—“The questions in this cause were anxiously discussed, and considered both before and after it was remitted to the Court below, by noble Lords, some of whom are now no more. One of these noble Lords, Lord Rosslyn, entertained but one unqualified opinion upon the subject throughout. He held that the settlement of 1793 was a fraud upon the law of deathbed, and that that deed was an unqualified revocation of the deed executed in 1771. His Lordship, therefore, observed in strong, although not in legally accurate, language, that it was impossible to splice two nullities in order to make one effectual deed of disposition. This expression was not technically correct, inasmuch as the term nullity could not be applied with strict precision to the deathbed deed, because it was *prima facie* a good deed, and was alone reducible by the heir, who was *alioqui successurus*. But his Lordship's meaning was this, that the first deed being revoked was an absolute nullity, and if the deathbed deed could not knit itself upon the first, it was a nullity likewise in the popular sense of the word, as it could convey nothing. Such were the sentiments of the noble Lord, which coincided with those of several Judges in the Court below, and were supported there by very strong arguments.

OPINION OF
LORD ELDON.
Bligh's Reports,
vol. ii. p. 682.

“Another noble Lord, Lord Alvanley, who is also now no more, seemed to regard the question in another view. So far as I could collect his sentiments, he did not consider the deathbed deed as an invasion of the law of deathbed, nor the *liege poustie* deed as altogether revoked by it; but his Lordship seemed to be of opinion that the first deed was to be considered as in existence to a certain effect, and he thought we should look at the effect of the two instruments taken together, and construe them so as that a disposition, which the disponent had a clear power to make, might be supported, and that the manner in which he did so was to be regarded as matter of form, and not of substance.

“But to this last sentiment I never can agree. I entirely concurred with the other noble Lord whom I have mentioned,

CRAWFORD
v.
COUTTS.
1806.

that matter of form in conveyancing is matter of substance ; and that it is not sufficient that a person should have power and an intention to dispose of his property, but that in order to render it effectual, he must execute it *habili modo*, or in other words, he must execute it in the form and with the solemnities prescribed by law for conveying such property.

“ The case of Rowan and Alexander, which I shall have occasion to remark upon more particularly hereafter, was more relied upon in the argument than I think it can well be. It was relied on in that case, and has been argued here, that the party might have given the value of the estate by a deathbed deed, and why therefore not give the substance or land itself. But this is not so by the law of Scotland any more than it is by the law of England. By the law of England, a will executed before three witnesses is necessary to convey land, and if land is so conveyed, it may be afterwards charged by a will which is not so executed. But it by no means follows, that because the total value of the estate could be conveyed in the way of a charge, although not attested, that therefore the land itself could be so conveyed. You know very well that even the surplus money arising from the sale of land cannot pass without a will attested by three witnesses, because a Court of Equity considers that as land.

“ It has been also said, that if a person means to revoke an instrument with reference to a particular purpose, if that purpose is not effected, the original instrument is not revoked.

“ This proposition is to a certain extent true, but it is to be understood with various limitations and distinctions. It is true, that if a party sits down meaning to revoke a disposition of his property, and by the same act, or, as it is called, *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete. But if he completed his purpose by a new disposition, the first is revoked, however inadequate such new disposition may be to convey his property. Thus, if having made a will of land, I afterwards make another in which I revoke it, and give my land to a monk or an alien, the revocation is good, although the

devise is void, because the purpose was complete so far as it was in my power to complete it. In the present case, the purpose of the party to dispoise his land anew was complete, which decides the case with reference to this argument.

“A good deal has been said on the doctrine of approbate and reprobate, and that it barred the heir from claiming in this case. I have made a good deal of inquiry into the grounds of the decision, to see if it went upon that ground, and if so, how it could be maintained upon it.

“I think that this is not a case where the doctrine of approbate and reprobate will apply. The heir does not claim under the deathbed deed. The heir says, ‘Your deed does not give you a title unless you can show me a deed executed in *liege poustie*, existing at the death of the granter; if there be no such deed, the deed executed on deathbed is gone.’

“In various cases, which I need not at present specially mention, the deathbed deed has been held to be good. The law of deathbed has been so far altered, that a person may by certain modes give away his estate by a deed on deathbed. Upon this point, as well as upon the practice which has prevailed with regard to trust-bonds, we cannot shake the cases without great danger to private property. In our own law, we have also instances of a similar kind, in the practice with regard to the barring of estates-tail, and the making of conveyances to enable a person to give legacies without regard to the statute of frauds.

“If, by inveterate usage and practice, you find men’s titles standing in a certain way, you will support them to the extent of the usage; but it is a very different thing to say that you should carry the law beyond the usage.

“It is admitted that if a valid *liege poustie* deed existed at the death of the granter, the deathbed deed would also be good. It is to be observed, however, that this *liege poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. This is obvious on principle—the stranger disposee is bound to hold good any power reserved against him; if such power be duly executed, he cannot complain. This seems also to have been admitted

CRAWFURD
v.
COUTTS.
1806.

by all the Judges, except those who decided against Mr. Coutts, on the ground of its being an evasion of the law.

"It is clear that Colonel Crawford meant to give the estate to Mr. Coutts. His power of doing so is also clear. In treating this matter, I deem it better to go upon the dry points of law than to consider whether it was more fit in Colonel Crawford to prefer the nearest branch of an ancient family, or to give his estate to that deserving gentleman, Mr. Coutts. The intention and power of the testator are both admitted.

"The only question is, Has he executed that intention by effectual means? It is admitted on all hands that Colonel Crawford might have charged the estate vested in the grantee of the *liege poustie* deed to its full value in favour of Mr. Coutts, or he might have directed him to convey that estate to Mr. Coutts. The testator, in doing so, acts in affirmance of the estate vested by the *liege poustie* deed, for the person to take by the deathbed deed could not call upon the disponent under the former deed to denude, unless the estate was vested in him. The author of the deathbed deed, in such a case, so far from revoking, asserts the validity of the *liege poustie* deed.

"Such cases are not authorities for the present decision, unless you could say Sir Robert Crawford had some estate under the deed of 1771, of which he could denude himself in Mr. Coutts' favour, or which Mr. Coutts could have adjudged. But it is impossible to say that he had such estate of which he could denude himself, or which could be adjudged, if it can be made out on the construction of the deathbed deed that such estate did not remain in him.

"You know that in Scotland the maxim of *mortuus sasi vivum* does not obtain as it does in this country; a proceeding in that country to take up the *hereditas jacens* is rather against the estate than the person. The right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept, or by an adjudication in implement. I say this to prevent any misunderstanding of the language which I use.

"Another case was put. It was stated, that the testator might have rendered the deathbed deed valid by a clause in it that he meant the deed of 1771 to subsist, if the deathbed deed was found to be ineffectual. I do not mean to deny this. He

CRAWFORD
v.
COUTTS.
1806.

would then have said, if my deathbed deed is not good, or if the disponee under it would not, or could not, take from popery or other cause, then the disponee under the deed of 1771 might have said to the heir *alioqui successurus*, 'the estate is mine;' and he might have proceeded to connect himself with it by his procuratory and precept, or if none had been contained in his deed, by adjudication. In that case, this would be the express meaning of the testator; I keep alive the former deed to all those purposes, to enable the disponee, in the deathbed deed, to say to the heir that he has no interest to impugn the deathbed deed.

"When I considered the cases of implied revocation, and I have never considered any question more deeply than the present, I am free to say that I never could have assented to affirm the case of Rowan and Alexander, if brought before me by appeal at the time when it was pronounced. Lord Rosslyn stated, when this cause was first here, that he could not give his assent to that case. But there is a manifest difference between what might have been fit and proper to be done when that case was recent, and what may be so at this day. No man can say that many titles may not rest on the principle of that case of Rowan and Alexander; and were we to touch that case, we might shake securities, in the validity of which there had been great confidence for many years. I allude to the trustbonds which had been devised and approved of by the most eminent persons upon the Bench in Scotland.

"In that case of Rowan and Alexander, a false principle was laid down on the Bench, that because the testator could effectually have given the value of his estate in money, therefore the disposition of the estate was valid. It was said in that case, that there was no express revocation, but it is difficult to perceive what could be a more express revocation than giving the estate wholly to another.

"That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked unless the second deed was found to be good; and expressing nothing as to a revocation of the former deed, must be held to have meant in effect that both should stand to accomplish the purpose he wanted of giving the estate to the disponee in the

CRAWFURD
v.
COUTTS.
1806.

last deed. This would apply also to the case of the disponent under the second deed being unwilling to take or incapable of taking.

“But the same principle will not apply to a case of express revocation. This is the first instance where this principle has been so applied. It is unnecessary to enter into the cases of Birkmyre, &c., which are different from the present, in the revocations being by different instruments.

“In the present case, as appears to me, there are only two questions; *First*, Is the disposition of 1771 revoked entirely? *Secondly*, Is it revoked *ad hunc effectum*, or *ad omnes effectus quoad* this species of question?

“The case of express revocation proves, and the decision in this case, with regard to the estate of Monkland, is the strongest of them all, that if the heir is let in *pro brevissimo intervallo*, the intention or power of the granter signifies nothing, though he had half a dozen ways of giving away his estate upon death-bed. It signifies nothing if this is not done *habili modo*. The cases of the destruction of the *liege poustie* deed, though cancelled only to execute another deed, or a revocation by indorsement, when a new deed was the next moment executed, clearly show this, that what may be done validly in one mode cannot be so in any mode.

“In the case of Monkland, the Court seems to have had considerable difficulty with their own decision; more, indeed, than I feel with regard to it. The disposition of Monkland was by a different deed from that of Crawfordland. The former disposition of Monkland was revoked, that Colonel Crawford might dispose of it by a sale; and on the same day he executed a disposition to Mr. Coutts by such mode of sale, but before completing this purpose, Colonel Crawford died. We see here strongly that the power to give away in certain modes, and the intention, are nothing. The Court, in their judgment, declared that it was the testator's purpose to give to Mr. Coutts, but they found, in terms too general to reconcile that decision with the decision with regard to Crawfordland, that the deed of 1793 had revoked the deed of 1771, and therefore they give the estate to the heir.

“It is clear in this country, where an estate can only be

devised by a will executed in the presence of three witnesses, that in such a will a person cannot reserve power to make a valid devise of his estate by will before fewer witnesses. All the doctrines connected with this rule of law were much canvassed in the case of *Habergham v. Vincent*. A person in this country cannot by the medium of a will or deed reserve to himself powers contrary to law.

CRAWFORD
v.
COUTTS.
1806.

“ In Scotland no man could make a valid *liege poustie* deed in this form—‘ Know all men by these presents, that I do hereby reserve a power to dispose of my estate at any time of my life, *et etiam in articulo mortis*.’ The *liege poustie* deed must be some actual deed of disposition existing at the death of the granter.

“ Put the case, that Mr. Coutts had repudiated the disposition in his favour contained in the deed of 1793 ; could the heir, under the deed of 1771, have made use of his procuratory and precept to attach to himself the *hæreditas jacens* ; or if there had been none such, could he have used an adjudication in implement against the estate ? This question depends upon the fact, whether the deed of 1771 was revoked by the deed of 1793, or not. If the testator left the deed of 1771 a subsisting deed, the disponee under the deathbed deed might make use of that shield to protect himself against the heir-at-law. In order to find that this case can be ruled by the decision in *Rowan and Alexander*, you must find the direct contrary of what the testator has expressed in the present case.

“ The deed of 1771 was a deed standing by itself, containing a procuratory and precept, and all the usual clauses of style. Let us see what the testator does or says with regard to this deed. Does he say that the deed of 1771 shall stand if the deed of 1793 is found not to be good ? Does he substitute Mr. Coutts in the room of the disponee under the deed of 1771 ? He does no such thing. The dispositive part of the deed of 1771, the procuratory and precept, are all revoked, and the deed of 1793 is made a complete disposition, standing solely by itself, containing a new procuratory and precept, and other usual clauses. It also contains the clause upon which the whole question turns.

“ The question of construction, as to what the testator has

CRAWFORD
v.
COUTTS.
1808.

said, arises upon this. He says, I don't intend that the disponent in the deed of 1771 shall be kept alive, and that the disponent therein shall denude in favour of Mr. Coutts ; but I do expressly revoke that deed, so far as conceived, in favour of the persons to whom it is granted ; and I keep it alive only with regard to the powers to alter, innovate, and revoke therein contained : thereby reducing the deed to nothing but one containing a power to alter and revoke.

" I never in this case could bring my mind to any other opinion than that the deed of 1793 reduced the deed of 1771 to a conveyance in favour of the heir *alioqui successurus*, because if the intermediate disposition was destroyed, the right of the heir to claim the estate was again set up. Any other opinion goes to make the deed of 1793 good by itself, which is illegal and impossible.

" I put another question to myself, which I hope will free me from any charge of mistaking the law. I cannot conceive what the deed of 1793 would do, whether it contained an express or an implied revocation of the former deed, unless I were able to say, that if Mr. Coutts could not or would not take, some right to take up the *hæreditas jacens* under the deed of 1771 would still remain. Now such right could not remain under the deed of 1771, because the revocation goes to every thing but what is therein excepted. How could a personal right of action be made out in the disponent under the deed of 1771, as the deed of 1793 absolutely revokes that deed, as far as it contained any disposition ?

" The case turns entirely on the true construction of this part of the instrument ; it destroys all right granted under the former deed without which the reserved powers to alter were vain.

" In the opinion which I have formed, I have the misfortune to differ from many persons in the Court of Session, of whom I am bound to say, that if I have been of any use in the matters of Scotch law I owe it to them ; but I have also the satisfaction to agree with many others in that Court, and with some who heard the case argued in this House.

" I repeat, that this is a question of construction only, and that all apprehension must be gone of touching any title to es-

tates, or any other decided case ; the present case turning upon this point, and neither upon any general or special construction of the law. I shall defer giving in the judgment which I mean to move in this case till to-morrow, contenting myself at present with stating this conclusion, that the heir *alioqui successurus* has both a title and an interest in this case."

CRAWFORD
C.
COUTTS.
1806.

1. In the case of CUNNINGHAME v. WHITEFOORD, June 10, 1748, the testator first disposed by a *liege poustie* deed, in 1741, that portion of his lands which were destined to HEIRS-MALE, to his brother consanguinean, who was his nearest heir-male, but under burden of his whole debts. The lands of Whitburn, which were destined to HEIRS-OF-LINE, he conveyed by the same deed to the eldest son of his sister-german. He afterwards, in 1746, while on deathbed, conveyed the same lands to the same disponees respectively, with this alteration, that the lands conveyed to his brother were conveyed under the additional burden of two bonds in favour of the testator's nieces, as well as under the burden of all the testator's debts. The second deed contained a revocation of all former settlements, and a duplicate of the former deed was cancelled in presence of the testator by his man-of-business.

2. On the death of the testator, his brother brought a reduction of the last deed, and a declarator to have it found that the former deed was revoked both by the express clause of revocation contained

in the last deed, and also by the act of cancelling. The object of this action was to enable the pursuer to take the lands destined to HEIRS-MALE free of the testator's debts and the two bonds in favour of his nieces, and to subject the HEIR-OF-LINE in payment of these burdens. The testator's nephew PLEADED,—The heir-male is entitled to reduce the second deed only in so far as he was prejudiced by it; and he is only prejudiced to the extent of the two bonds. The pursuer cannot both approbate and reprobate the second deed, which he does, by seeking to have it reduced, while he at the same time attempts to take the benefit of the clause revoking all former settlements. The Lords "Repelled the defence, that Sir David Cunninghame was barred from quarrelling the deed 1746 by the deed 1741; and found the same was revoked by the revocation in the deed 1746; and found the reasons of reduction of the said deed 1746, and of the two bonds of the same date, relevant and proved." This judgment was carried by the casting vote of the LORD PRESIDENT DUNDAS.

3. On the Session Papers, LORD KILKERRAN has given the state of the vote, and the grounds of the opinion of the majority and minority.—“June 10, 1748. Adhered by the President’s casting vote. Against the interlocutor—Drummore, Strichen, Kilkerran, Dun, Elchies, Leven. For it—Justice-Clerk, Minto, Monzie, Murkle, Tinwald, Shewalton, and Arniston President. It was argued by the minority, — *Primo*, That the heir could not quarrel the deed 1746 further than he was thereby prejudiced, and that he was not prejudiced, so far as it was the same with the deed 1741, for, so far he would have been excluded by the deed 1741, had the deed 1746 not been made. *Secundo*, That he could not approbate and reprobate the same deed; and, therefore, if he founded on the revoking clause in the deed 1746, he could not quarrel the disposition therein made, of Whitburn to the defender. *Tertio*, That the revoking clause, though general, was not to be understood to mean farther than a revocation of all former settlements, so far as they were different from that now made in 1746, which contained the revoking clause; and to understand it otherwise and more largely is *captanda verba*, for no one can believe the intention to have been other than has been said; and though it may be true that in construing conveyances to land, there is no arguing from intention against plain words, yet that does not apply to this case, where there is no doubt about the validity of

the conveyance 1746; but all the question is upon the import and meaning of a revocation which is *animi*. That this case differs from any that is to be met with in our own law books or decisions. All the cases to be met with in either, are of two dispositions to different persons: *e.g.*, A. disposes to B, a stranger, with a power reserved to alter even on deathbed. He afterwards disposes on deathbed the same subjects to C., and the question is, Whether the heir of A. can quarrel the disposition to C.

4. “The strength of the argument on the other side was put upon the generality of the revoking clause in the deed 1746, so expressed as to admit of no dubiety but that it was that deed, and that deed only, that his estate was to be carried by, and which was further confirmed from the circumstances of his suffering the duplicate, which was in his own hands, of the deed of 1741 to be thrown into the fire; and there was no inferring from the defunct’s *animus* contrary to a plain declaration that admitted of no dubiety. And as to the point, that the heir could not approbate and reprobate, it did not apply, unless the pursuer were to take by the deed which he reprobated, whereas he proposed to take nothing by it. And, indeed, the import of the revoking clause was the chief question, which the minority considered but as a clause of style, and to be construed from what undoubtedly appeared to have been the *animus* of the grantor.”—*MS. Notes, Kilkerran’s Session Papers.*

5. The judgment in the case of **CUNNINGHAME v. WHITEFOORD** was affirmed in the House of Lords by consent, in consequence of a compromise having taken place. **LORD HARDWICKE**, Chancellor, is reported to have intimated his opinion that the judgment was erroneous, and to have stated, that the respondent had acted wisely in acceding to a compromise. In consequence of this remark of Lord Hardwicke, the judgment has generally been considered an erroneous one, but the judgment of the House of Lords in the case of **CRAWFURD v. COUTTS**, reversing that of the Court below, has confirmed the soundness of the judgment in the former case.

6. In the case of **FINLAY v. BIRKMIRE**, July 29, 1779, the prior deed was not revoked, but cancelled. At the same time that the disponent cancelled the prior deed, he executed the deathbed one. The heir-at-law brought a reduction, and **PLEADED**,—It is no bar to the heir-at-law that a previous deed in favour of a stranger has been executed. The deed must remain during the life of the granter, neither cancelled nor taken out of the way by a subsisting deed of revocation. If either of these acts takes place, the heir-at-law returns to his right of succession. In the case of an implied revocation, the consequence of setting aside the deathbed deed is to take away the implied revocation and open the succession to the dis-

ponee in the prior deed. But the effect of cancelling the prior deed is to destroy it altogether, and put the disponent in the same situation as if it had never existed. The cancelled deed is therefore no bar to the succession of the heir-at-law. The defender **PLEADED**,—The heir-at-law has no title to challenge the deathbed deed. He is not prejudiced by it, as his right to the succession was excluded by the prior deed. The disponent under the prior deed is the only party who is affected by the new settlement, and he is barred from challenging it by the reserved faculty contained in the prior deed. The cancelling of the prior deed does not remove the objection. An implied revocation will not entitle the heir to challenge a deathbed deed. But an implied revocation has all the effects of an express revocation. At any rate, the cancelling of the prior deed in the present instance cannot be considered as opening the succession to the heir-at-law. It only took place at the time the new settlement was executed. They were both parts of the same transaction, executed *unico contextu*, and the object of the granter evidently was to alter one destination of heirs for another, but in no event to admit the heir-at-law. The Court "Sustained the pursuer's title to insist in the present process of reduction of the deed challenged *ex capitelecti*," altering the interlocutor of the Lord Ordinary, who had found the heir excluded by the prior deed.

When the Deathbed Deed contains an express Revocation of a prior Settlement, the right of the Heir revives, although both Deeds are in favour of the same Disponee.

MOIR v. MUDIE.

March 1, 1824. **NARRATIVE.** IN 1805, the Reverend John Aitken executed a settlement of his whole property, heritable and moveable, in favour of his three nieces, Mrs. Moir, Mrs. Mudie, and Mrs. Ford. These ladies were sisters, and the heirs-at-law of Mr. Aitken. The deed reserved full power to the testator, at any time of his life, and even on deathbed, to revoke, alter, innovate, or cancel, the disposition in whole or in part, as he might think proper.

In 1813, the testator executed a new disposition, conveying his whole property to two of his nieces, Mrs. Mudie and Mrs. Ford, and excluding his third niece, Mrs. Moir, to whom he provided an annuity, and also a sum to her children, to be held in trust for their behoof by Mr. Mudie and Mr. Ford.

In 1816, while on deathbed, the testator executed a third deed of settlement, by which he conveyed to Mrs. Mudie, as in the second deed, but the share of Mrs. Ford he conveyed to Mr. Mudie and Mr. Rattray as trustees for her behoof, excluding the *jus mariti* of her husband. The cause of this alteration regarding the share of Mrs. Ford was the bankruptcy of her husband, and was done for the purpose of excluding his creditors. The third deed revoked all former dispositions and settlements.

Mrs. Moir, who had been excluded by both the second and third deeds, brought a reduction of the third deed, in so far as it was a deed of conveyance, but founded upon it, in so far as it contained a revocation of the former deeds.

**ARGUMENT FOR
DISPONEE.**

PLEADED FOR THE DISPONEE.—The deathbed deed was executed merely for the purpose of carrying into effect the prior deed of 1813. It is to be considered as immediately connected with that deed. The law of deathbed applies only to deeds which are substantially new deeds, and altogether differing from the one previously executed. The deathbed deed was executed

not for the purpose of destroying, but of supporting the prior deed.

MOIR
v.
MUDIE.
1824.

The clause of revocation must be construed according to what was the manifest intention of the maker of the deed. The last deed was intended to be purely remedial, and was calculated for no other purpose than to give effect to the deed of 1813.

PLEADED FOR THE HEIR-AT-LAW.—By the law of Scotland, a proprietor is utterly disabled from exercising his power of alienation while upon deathbed. The deed of 1813 expressly reserved a power to alter even upon deathbed. That power was exercised by the deed of 1816, so the deed of 1813 was thereby effectually set aside. A revocation is equally effectual whether it be expressed in a separate deed by itself, or whether it is contained in a deed of conveyance.

ARGUMENT FOR
HEIR-AT-LAW.

The intention of the testator to prefer a stranger disponee to his heir-at-law, cannot support the deathbed deed, either directly or through the medium of the deed executed *in liege poustie*, if this last deed has been revoked expressly and unconditionally. It then no longer subsists as a conveyance of the property. The identity of the interest or of the disponees under the two deeds may be clear indications of the intention and the predilection of the testator ; but in a question with the heir, the intention of the testator is no bar to his right to reduce. The *liege poustie* deed having been revoked, the deathbed deed falls to be reduced. The reduction *ex capite lecti* is a privilege inseparable from the character of the heir *alioqui successurus*. Of this privilege nothing can deprive him, except a valid *liege poustie* deed, subsisting and unrevoked at the ancestor's death. By such a deed only he is divested of his character and privilege as heir.

LORD PITMILLY, Ordinary, "Repelled the Defences, and decreed in terms of the libel."

Interlocutor of
Lord Ordinary.
June 26, 1817.

The Disponee having Reclaimed, the Court were equally divided. Lord Cringletie was then called in, and he having concurred in the Interlocutor of the Lord Ordinary, the Court "Adhered."

JUDGMENT.
March 2, 1820.

MOIR
v.
MUIR.
1824.
OPINIONS.
Faculty Re-
port.

LORDS GLENLEE and BANNATYNE "Thought that a general revocation in a deathbed deed had some flexibility, so as to allow it to be adapted to what was evidently the intention of the granter. They thought that the case of Coutts was properly decided by the House of Lords, as it was apparent that the granter of the deathbed deed intended that the person favoured by the *liege poustie* deed should in no event succeed. They thought that, although the fact of the two deeds being in favour of the same person was not conclusive, it was a circumstance of great weight in the *quæstio voluntatis*; and that, while a *liege poustie* deed in favour of a different person must be taken out of the way in order to make room for the person favoured in the deathbed deed; on the other hand, where the deathbed deed was in favour of the same person as the *liege poustie* deed, and merely conferred additional benefits upon him, the latter must be considered as still subsisting in favour of such person, and only altered to a particular effect, unless it was expressly revoked *in toto*."

LORD JUSTICE-CLERK BOYLE and LORD CRAIGIE "Thought that the heir's right of challenge being universal, and not being barred unless annihilated by a valid deed in *liege poustie* subsisting at the death of the ancestor, and the clause of revocation in this case being universal, unqualified, and unambiguous, his challenge must be admitted. And they thought that it made no difference in such a case, that the disponees were the same. They thought that the case of Coutts was properly decided by the House of Peers."

LORD CRINGLETIE "Thought that there was little doubt of the granter's intention, but that the Court could only look to the execution of intention; that the revocation of the *liege poustie* deed was general and unqualified; and that, when the language employed by a party was clear, the Court could not alter the deed which he had executed, merely on a conjecture of his intention."

House of Lords,
March 1, 1820.

The Disponee having Appealed, "It was Ordered and Adjudged, That the appeal be dismissed, and the Interlocutor complained of be affirmed."

LORD ELDON, Chancellor, observed,—“Your Lordships have,

within the last few days, heard a case in which the question to be decided is, Whether a will which was made by a gentleman of the name of Aitken, but which did not bear date sixty days before his death, was a valid disposition ? or, on the other hand, Whether it was an invalid disposition ? it being contended, that though it might not be good as a disposition, it was good as a revocation of a former will.

MOIR
v.
MUDIE.
1824.

“ My Lords, the nature of the case certainly is such, that one cannot help feeling it a case of considerable hardship on the appellant, Mrs. Mudie ; but after the greatest attention which I have felt it my duty to give to this case, in consideration of that circumstance, and also in consideration of the Division of the Court of Session, by whom this case was decided, having been divided in their opinion, it does appear to me, I own, to be impossible to advise your Lordships to reverse the judgment which has been given. There is this peculiarity in the law of Scotland, that though a deed is bad as a deathbed deed, it may be good for one purpose, that is to say, that the heir-at-law can insist that it is a good deed, provided the effect of it be to revoke a former settlement, though in itself it would be bad.

“ In this case, it has been strongly contended at the Bar, that it ought not to operate as a revocation, although there are express words of revocation in it ; and that it ought not to operate as a revocation, because there had been a former deed, and that it was an affirmance of that former deed. Now, in truth, in respect of that, there is hardly a single interest which is given in the former deed, which is not somehow, in its nature and quality, altered by this. It does, therefore, appear to me, that whatever might be the law—in respect of which I beg I may be understood to give no opinion whatever, if the dispositions had been exactly the same—I give no opinion whatever upon the principles which might or might not apply to such a case,—they do not apply to this case ; and therefore, however much I may regret the hardship of the case, it appears to me your Lordships can give no other judgment but that of affirmance of this judgment.”

1. In the case of *LANG v. WHYTLOW*, March 6, 1810, the testator conveyed the liferent of a subject to his wife by a deed executed in *liege pourstie*, and he further conveyed to her the fee of the same subject by a deathbed deed. This last deed contained an express revocation of the prior one. The Court held the prior deed revoked, except in so far as related to the interest of the widow under it, on the ground that the second deed was intended to increase and not to diminish her interest. On this part of the judgment LORD JEFFREY, in the case of *LEITH v. LEITH*, June 6, 1848, observed,—"With regard to the special finding in *LANG v. WHYTLOW*, by which the revocation was held not to extend to the liferent provided by the former deed to the widow, I can only say that I have always regarded it as palpably inconsistent with the rest of the decision, and with the clearest principles of law. I was of counsel of the successful party in that case, and had this impression at the time. But the case of the widow was thought very hard; and, according to my recollection, we did not on the part of the pursuers make any great objection to the exception somewhat suddenly started at the close of the case in her favour."

2. In the case of *BATLEY v. SMALL*, February 2, 1815, the ground of defence was, that the deathbed deed, which revoked all former deeds, was in favour of the same donee as that under the prior deed. The defender PLEAD-

ED,—Questions of revocation are to be judged of according to the intention of the granter of the deed. In the construction of clauses of revocation, intention is of exclusive and prominent authority. The clause ought therefore to be construed according to the true and apparent intention of the writer, as it may be gathered from the whole of the deed in which the clause occurs. When the heirs in the two deeds are different, it is presumed that the granter did not wish the revocation of the first deed to depend upon the ultimate validity of the second, and therefore, the revocation is sustained. There can be no room, however, for such presumption, while both deeds are in favour of the same person. Where a testator first conveys a benefit by one deed, and then enlarges it in favour of the same person by another deed containing a revocation of the first, it is impossible to presume that he meant both of them to be destroyed.

3. The Court Found, "That the right competent to the heir to challenge and set aside deeds executed by the ancestor *in lecto* to his prejudice, agreeable to the principles laid down in the judgment of the House of Lords in the case of *Crawford v. Coutts*, March 14, 1806, did not extend to render null a clause of revocation contained in such deed; and that the general clause of revocation in the deed 1805 effectually revokes and renders null the former dispositions, codicils, and settlements."

4. In *ANDERSON v. FLEMING*,

May 17, 1833, the deathbed deed was almost identical with the one executed in *liege poustie*. It, however, contained a revocation of all former deeds of settlement. LORD MONCREIFF, Ordinary, Ordered Cases to the Court on the Question, "Whether the prior deed was to be considered as so effectually revoked by the clause of revocation in the deathbed deed as to entitle the pursuer, as the heir-at-law, to reduce the last deed as an independent deed to his prejudice, executed on deathbed?"

5. In a Note, LORD MONCREIFF observed,—“After carefully comparing the two deeds of settlement, the Lord Ordinary thinks that the case comes so very near to the pure case of two deeds exactly the same in substance, on which Lord Eldon, in the case of *Moir v. Mudie*, reserved his opinion, that the question raised by it, if it is to be decided on this point, is far too important to be sent in any form to the Court without Cases. He therefore finds it necessary to make the above order. For himself, he finds great difficulty in making the distinction. In the cases of *Whiteford*, *Batley*, February 2, 1815, and *Moir*, the parties favoured were the same in both deeds; and the variations made were only for more effectually carrying the same objects into effect. If it were to be held that such a question may be decided on a view of the probable intention of the testator, that the first deed should only stand revoked in case the second should take effect, the Lord Ordinary fears, that every one of the cases

hitherto decided, including *Coutts*, must be thought to have been determined contrary to such intention. In the present case, the new deed is said to have been executed on account of an apprehended legal objection to the validity of the first—which, whether well-founded or not, may sufficiently establish the purpose of entirely superseding it, and relying on the last deed. The question, notwithstanding, is very delicate and difficult.”

6. The Court Repelled the objection to the Title to pursue. LORD JUSTICE-CLERK BOYLE observed,—“I have paid every attention to the argument that there is a distinction between the principle in the case of *Moir* and *Mudie* and this, but I can see no ground for it whatever. It is settled law that the plea of approbate and reprobate does not apply, and the decisions in the cases of *Batley* and of *Moir* and *Mudie*, though in the latter there was a variation in the deeds, go to the same principle, as stated by the Lord Ordinary, viz., that in all the cases the Court never entered into the view of the supposed intention of the testator. Then that being decided, all that is said on the other side is, that Lord Chancellor Eldon, according to his uniform practice of not deciding any cause not actually before him, refrained from giving an opinion. It is not that he expressed a doubt, but only that he refrained from giving an opinion, as not necessary to the decision. And I have not seen any authority for departing in this case from

the principle in the cases of Batley and Moir and Mudie, that the revocation being absolute, effect must be given to it." LORD CRINGLETTIE observed,—“I entirely agree. The question of intention only arises when we have a subsisting deed, and the intention executed. The revocation is pointed and express, and puts an end to the former deed. And even there are variations here of two legacies, and though trifles, they make a different deed.”

7. LORD MEADOWBANK observed,—“In the case of Coutts v. Crawford two principles were settled, one as to approbate and reprobate; the other, that all questions of this kind were questions of conveyancing, and that, however clear the intention was, it could not be effectual unless legally executed. The intention of the testator was clear in that case, and the Lord Chancellor held that *quod potuit et voluit non fecit*. I understood it to be settled since then, that we were not to look at intention at all. After that decision, the case of Whitelaw came on in the First Division, while President Blair was there. I got his notes from Mr. Blair, and from them it appears that the case was most elaborately considered. Several points occurred, one of which was, whether revocation would be effectual though not tested according to the solemnities of the law of Scotland. Another was that

raised in the present case, and on it his Lordship lays down the doctrine, broadly opposed to that established in the case of Coutts and Crawford, that the revocation could not be separated, when the deeds are in favour of the same person. Seeing that opinion, and that Lord Eldon reserved any opinion on the subject, I looked through this case with great anxiety; but on the whole, after going through all the authorities, I have come to be of opinion that there is no foundation for the distinction attempted, and I do not think there is any ground for complaining of hardship; and on the whole, my opinion concurs with that of your Lordship.”

8. LORD GLENLEE observed,—“I think, as the Lord Ordinary does, that there is no solid distinction between this case and that of Mudie. There were variations there, no doubt, but they were to strengthen the right of the party favoured, and it was truly as strong a case as this. I had the same view as President Blair expressed in the case of Whytlaw, but after the decision in the case of Moir and Mudie, affirmed in the House of Lords, we must adhere to the principle there established; and after all, it may be said that it is, not that the testator did not intend to revoke, but that if he had foreseen what was to happen, he would not have had that intention, and I cannot hesitate to concur.”

An implied Revocation of a prior Settlement in favour of a Stranger does not restore the right of the Heir of the Investiture, and entitle him to reduce the subsequent Deed as being executed on Deathbed.

I.—ROWAN v. ALEXANDER.

IN 1763, James Rowan executed a general disposition of his estate, real and personal, in favour of his wife and two nephews, Robert and James Rowan, sons of a younger brother. In this deed he reserved to himself full power, at any time in his life, and even on deathbed, to revoke or alter, in whole or in part, and to dispose of the premises as he should think fit. One of the subjects conveyed was the lands of West Shield, to which he had acquired right by purchase.

Nov. 12, 1775.
NARRATIVE.

In 1768, he executed, while on deathbed, a second deed, by which he conveyed the lands of West Shield to his wife and a nephew, Robert Alexander, the son of a sister, in the proportion of one-third to his wife and two-thirds to his nephew. This second deed contained no clause revoking the former deed of 1763.

At the foot of the second deed, the following ratification appeared :—" We, Robert and James Rowan, nephews and heirs of the within designed James Rowan, do hereby approve of the within disposition, in the haill clauses and heads thereof." This ratification was duly signed and tested.

The testator died shortly after the execution of the second deed. The son of his elder brother brought a reduction of both deeds, on the ground that the first deed was taken away by the last one ; and that the last one was reducible, as having been executed on deathbed ; and that therefore the succession fell to him as heir of conquest.

PLEADED FOR THE HEIR OF CONQUEST.—The deed of 1763, in so far as it related to two-thirds of the lands of West Shield, was virtually revoked by that of 1768. By the former deed, one-third of these lands was conveyed to the testator's wife, and two-thirds to his nephews, Robert and James Rowan. By the second deed, one-third was conveyed to his wife, and two-thirds

ARGUMENT FOR
HEIR OF CON-
QUEST.

ROWAN
v.
ALEXANDER.

1776.

to another nephew, Robert Alexander. This last deed having been executed on deathbed, the pursuer is entitled to two-thirds of the lands as *ab intestato*.

The pursuer is not excluded by the deed of 1763. The benefit of the law of deathbed is competent to every heir, of whatever kind. Nothing will exclude an heir from this privilege, but such a deed as will make him cease to be an heir. A disposition executed in *liege poustie*, divesting the disponent irrevocably, though with reserved powers to burden, excludes the law of deathbed. But where one disposes his estate, though in *liege poustie*, reserving a power to alter, or when he disposes without such reservation, but retains the disposition in his hands, and dispenses with the delivery in his lifetime, such dispositions do not divest the granter's heir of the character of heir, nor of the privilege of the law of deathbed belonging to him in that character. Such dispositions have no effect during the granter's life, neither denuding him, nor conveying any right to the disponent, but importing only the granter's resolution at the time with regard to his succession. They have no force nor effect while the granter is alive.

If, therefore, the disponent revokes such a deed at any time during his life, either expressly or tacitly, by destroying it, or conveying the subject to another, the disponent, who never had any established right by the deed, nor was heir, cannot challenge the revocation on the head of deathbed. His right was only to arise upon the death of the disponent without revocation. As therefore the deed was revoked before that period, the case was the same *quoad* the disponent, as if the right had never been granted.

In this case the right of the heir does not properly revive. Those deeds which might have become effectual by the death of the granter, are the same as if they had never existed. Whenever they are revoked, they are considered as nonentities. Notwithstanding the deeds, the granter continued to be proprietor, and the heir continued to be his heir, because they could have no power till the granter's death ; and before that period they were at an end.

It is immaterial that the deed of 1768 contained no express revocation. So far as concerns the two-thirds of the lands of

West Shield, the two deeds were incompatible. They could not both subsist or take effect together. If, therefore, it be admitted that the testator intended the last deed to vest his successor as to these lands, he must have meant that the first should not be the rule of his succession. In other words, he meant, in so far to revoke the first. There may be a tacit or implied revocation as well as an express one. And there cannot be a more effectual revocation than giving the same subject to a different person. There are no *solemnia verba* requisite for revoking a prior deed, nor any peculiar virtue in an express revocation, further than it is significative of the testator's intention, which may be as strongly declared indirectly. By executing the last deed, the testator declared his purpose, that the first, with respect to two-thirds of the lands of West Shield, should not be the rule of succession, as strongly as if he had used the most express words that language could supply.

ROWAN
v.
ALEXANDER.
1775.

It is only a person's last will that the law regards in succession. As soon as the last deed was executed, the first was to all intents and purposes at an end. It was no longer the last settlement. A man may have many settlements at different periods of his life. All of them are indeed proofs of his intention at the times they were respectively made ; but it is the last one only that must rule his succession. If, however, the last settlement is reduced, the legal succession must take place.

PLEADED FOR THE DISPONEE.—The deed of 1763 was never revoked or extinguished. It was considered as a subsisting deed, and the deed of 1768 was only meant to qualify or vary it in part. Both deeds are therefore valid and effectual, the one being explanatory of the other, and both together making a complete settlement. The last deed, neither expressly nor by implication, takes away the former settlement as to the general plan of succession devised by it. It is only a partial conveyance of one particular subject, and was intended as supplementary to the general settlement, in exercise of the faculty contained in it, and which he was entitled to exercise at any period of his life. The disponees by the settlement of 1763 were still to succeed to the testator as his heirs in terms of that settlement. By his last deed, he thought proper to qualify their

ARGUMENT FOR
DISPONEE.

ROWAN
v.
ALEXANDER.
1775.

right, by laying an additional burden upon them. The two deeds are therefore consistent with each other, and they together form what the testator intended to be the last and final settlement of his succession.

Where the *liege poustie* deed is in favour of a person not *alioqui successurus*, and whose right is qualified with a reserved power, in favour of the granter, to alter or revoke at pleasure, the party called by the settlement is not at liberty to object to the exercise of the reserved power upon deathbed, because it is an express quality in his right. The heir-at-law is as little entitled to object, because he stands already excluded by the former deed.

The only case in which an heir-at-law is entitled to come in, is where the *liege poustie* deed is totally extinguished, by being cancelled or revoked. The right of the heir-at-law may be then said to revive, and having once got quit of the *liege poustie* deed, there may be an opening for him to quarrel any after deed executed to his prejudice on deathbed. But where the deed in *liege poustie* remains a subsisting deed, unrevoked and uncanceled, and only qualified or varied in part by an after deed in exercise of a reserved faculty, there can be no room for any challenge on the head of deathbed at the instance of the heir-at-law.

Interlocutor of
Lord Ordinary,
Feb. 7, 1775.

LORD AUCHINLECK, Ordinary, Found, "That the first deed of settlement 1763, which is general, of the whole estate heritable and moveable, belonging to the defunct, in favour of Bessy Rowan his wife, and of Robert and James Rowans his nephews, equally betwixt them, containing a power of revocation, is a valid and effectual deed, so far as not revoked: Finds the disposition executed by the said deceased James Rowan, in favour of the said Bessy Rowan his spouse, and Robert Alexander his nephew, of his lands of West Shield, in the proportion of one-third of them to her, and two-thirds to Robert Alexander, whom he burdens with a variety of donations to the persons therein mentioned, and bears date in 1768, as it contains no clause of revocation, general or special, does not therefore hurt in any respect the settlement 1763, except in so far as the two deeds are incompatible: Finds, so far as concerns

Bessy Rowan, no alteration is made; but so far as concerns the two-thirds of the lands disposed to Robert Alexander, this being incompatible with the former settlement, of necessity implies a revocation, and as this last deed was admitted to have been executed on deathbed, sustains the reasons of reduction, so far as concerns the two-thirds of West Shield, but Repels the reasons of reduction, as to all the other subjects, and decerns accordingly."

ROWAN
v.
ALEXANDER.
1775.

The defender having Reclaimed, the Court "Sustained the defence, Assolizied the defenders, and Decerned."

JUDGMENT.
Aug. 8, 1775.

LORD PRESIDENT DUNDAS observed,—“ The case of the succession of Sir James Cunningham was determined finally here; but there was a great difference of opinion. On appeal, the respondent was advised to compromise matters. The lawyers came to the Bar, and declared that they were agreed in the affirming the judgment. There was a compromise, and a sum paid. Lord Hardwicke said, that the respondent was well advised. This case is not so narrow as that of Cunningham; for there the former deed was actually cancelled, at least that copy of it which was in the power of the disponent.”

OPINIONS.
Hailes' Decisions, p. 659.

LORD MONBODDO.—“ After a settlement once made, though revocable, the person called is the heir; and, if he consents, the revocation is good. But here there is not a total, only a partial revocation. The testator plainly meant that the former deed should subsist in part.”

LORD COALSTON.—“ This precise question has never received any precise judgment of the Court. Decisions ought to be more fully stated. When a man grants a deed to take effect after death, the settlement is revocable. Suppose that he destroys the deed, and, *ex intervallo*, makes a settlement on strangers on deathbed, this is reducible. The same is the case if he revokes on the back of the settlement. Suppose a deed revoked, and, in that deed revoking, a new deed granted to a stranger. It is difficult to distinguish between an express and a virtual revocation.”

LORD PRESIDENT.—“ Here there is no *mutatio voluntatis*, as in the cases put. There is no revocation of the former deed. If the second deed is set aside, I think the former one must be the rule, and that no *mutatio voluntatis* must be presumed.”

ROWAN
v.
ALEXANDER.
1775.

LORD KAMES.—“ A man makes a settlement of his whole estate ; alters his mind, but upon deathbed. The two deeds are inconsistent. The latter deed is good as far as it goes. There is an implied revocation *ad hunc effectum*. If that is the case, there is no room for the heir of line to interpose.”

Nov. 22, 1775.

OPINIONS.
Hailes' Decisions, p. 661.

The pursuer having Reclaimed, the Court “ Adhered.”

LORD MONBODDO observed,—“ The deed 1768 is not in prejudice of the heir, for he was excluded by the deed 1763. If there had been first a revocation, and then, at some interval, another deed, the case would have been different ; for, after the revocation, the grantor would have been intestate, and the heir would have had an interest which a second deed on deathbed would have impaired. As to the case of Cunningham, it was carried by the President's casting vote against the judgment of Lord Elchies, and was at length ended by a compromise on the appeal.”

LORD KAMES.—“ It is a general rule in law, that a man cannot be received to plead against a deed when he has no interest ; but then the question still occurs, Whether there is here a deed standing against the heir ? Had Rowan first of all put the former deed in the fire, or expressly revoked it, there would have been room for the heir's complaining ; for then the new deed would have been to his prejudice, and have deprived him of the right, *ab intestato*, which he got by the cancellation. Had Rowan been asked what he meant by the second deed, and whether he meant, in any event, to let in the heir ?—I am persuaded that he would have answered in the negative.”

LORD ALEMORE.—“ When a revocation is executed, it must have its effect ; but I cannot admit of a virtual revocation. This comes to be a *questio voluntatis*. It appears to have been the will of the testator not to let in the heir.”

LORD JUSTICE-CLERK MILLER.—“ The heir has very artfully endeavoured to make the last deed consist of two parts,—a revocation and a new settlement ; but it was one single act. The judgment formerly pronounced does not impinge on the law of deathbed, which gives relief to heirs of all denominations, if lesed. I hope we shall never be deprived of the law of deathbed. The only thing that can deprive us of it is, if we extend it to cases which the law did not mean it to reach.”

Mr. Tait, in his Decisions, observes,—“ The defence chiefly insisted in was, that the first deed was not expressly revoked by the last ; and, therefore, although the last deed should be taken out of the way, the first would still subsist ; and so the Lords found, they held a virtual revocation of the first not sufficient, and assolizied the defender. And the decision was well founded ; for if a deathbed deed contains both a disposition and a revocation, there may be some reason for maintaining, that though the disposition be set aside, the revocation may subsist, because they are distinct ; *et utile per inutile non vitiatur*. But when the deathbed deed contains no revocation, and is cut down on the head of deathbed, it cannot be maintained with plausibility that it ought to subsist as a revocation.”

BOWAN
v.
ALEXANDER.
1775.
Brown's Supplement, vol. v.
p. 423.

II.—ROXBURGHE v. WAUCHOPE.

In 1790, John Duke of Roxburghe executed a general settlement, by which he conveyed to his sisters, Lady Essex and Lady Mary Ker, all the heritable and moveable estate then belonging, or which should happen to belong to him at his death. In this deed he reserved to himself power, at any time of his life, and even on deathbed, to revoke or alter the deed, in whole or in part, and to sell, burden, or otherwise dispose of the whole estate, heritable and moveable, thereby disponed, or any part thereof.

May 25, 1820.
NARRATIVE.

The Investitures of the lands so conveyed were partly in favour of heirs of line, and partly in favour of heirs-male.

In 1803, his Grace executed another deed, by which he conveyed to the defender his whole unentailed heritable property, and also his whole personal or moveable estate in trust, for the uses and purposes therein specified. The disposal of the residue was directed to take place according as the truster had already directed, or might direct, by any deed or other writing executed, or to be executed by him for that effect, at any time of his life, or even on deathbed.

In March 1804, the Duke executed a deed of directions to his trustees, by which they were appointed to sell his whole real

ROXBURGH
v.
WAUCHOP.
1820.

estate in Scotland, and from the produce thereof, and of his personal estate, to make payment of certain legacies and annuities. The trustees were then directed to invest the whole residue of the trust-estate in the public funds, or upon real estate in Scotland, and to pay over the dividend or interest thereof to his sisters Lady Essex and Lady Mary Ker, and the survivor; and upon the death of the survivor, to pay over the residue to certain persons therein named. This deed of instructions was executed on deathbed; the Duke having died on the 19th March 1804.

An action was brought by Lady Essex and Lady Mary Ker, seeking to have it found, that the deed of instructions ought to be reduced on the head of deathbed. In this action they succeeded, in so far as regarded the lands in which the investitures were in favour of the heirs of line, but in so far as regarded the lands in which the investitures were in favour of the heirs-male of the Duke, they were unsuccessful.

The Heir-male of the Duke then brought a reduction of the trust-deed and relative deed of instructions, on the ground that the latter deed had been executed on deathbed. He also sought to have it declared, that the deed of 1790 had been revoked by the trust-deed, and that, therefore, he, as heir of investiture, was entitled to succeed.

ARGUMENT FOR
HEIR OF INVESTI-
TURE.

PLEADED FOR THE HEIR OF THE INVESTITURE.—The question at issue is, Whether the deed of 1790 was revoked by the deeds of 1803 and 1804, and whether the effect of that revocation remains, although these deeds be reduced *ex capite lecti*?

The deed of 1790 contained a reservation of a power to revoke or alter. It was to be effectual only in so far as not revoked or altered by a deed under the Duke's hand. This reserved power was exercised by the subsequent deeds. By these deeds the whole estates which formed the subject of the deed 1790, instead of remaining conveyed in terms of that deed, were conveyed to trustees for behoof of a totally different set of persons. This was a complete revocation of the deed 1790. It consequently ceased to have any validity or to have in any respect the effect of a delivered evident.

An express revocation is admitted to have the effect of letting in the heir of the investiture. In the case, however, of implied

revocation, it is argued that there is no revocation at all, except by the effective operation of the latter deed in favour of the new donee. But a revocation, whether express or not, is precisely the same revocation in the intention of the testator, and that intention is equally communicated and recorded by express words, or by words not express, but fairly implying it.

ROXBURGH
v.
WAUCHOP.
1820.

The plea that a subsequent disposition does not contain an implied revocation of a prior revocable disposition, but merely creates a right preferable to that of the first donee, is without foundation, either in the form and nature of such deeds, or in practical law. As to the nature of the deed, the testator says, in substance, in the first deed, I dispoise to A, reserving power to revoke. Then in the second deed, he says, The land I formerly dispoised to A, I now dispoise to B. This is surely a substitution of one disposition in place of another, and not the mere addition of one to another, as co-existent parts of one settlement. The last deed is a complete and absolute disposal of itself. It conveys all right to the subject, and there is no reason for supposing that it intends to leave anything whatever to the first donee. It necessarily implies a revocation of the former deed, for without implying this, the testator could not have given the subject to the second donee. Whether the revocation is called express or implied, the fact of revocation duly and clearly made is equally certain.

It is said, however, that there is a difference between the case when express words of revocation are used in the last deed, and when they are not used. In the latter case, it is argued, that the last deed is to be understood as conditional, and that a condition is to be presumed in favour of the donees called by the first deed, that in case the persons called by the last deed shall not take, then the persons called by the first deed shall still take the estate, and the first deed remains effectual in their favour. If there were such a condition or provision in the last deed, this argument might be very good. But in the present case, there is no such condition, and there exists no ground for saying, that such a condition is to be presumed, although not expressed. If such a condition had been intended, it would have been expressed, and the fact of its not being expressed, is sufficient to show that it was not intended.

ROXBURGH
v.
WAUGHOPF.
1820.

There is no ground for presuming that the testator intended any such presumption. The disponent has taken the estate from A and given it to B. It follows from this, that A should not have it in any event. The destination to A was totally superseded by the last deed, and cannot revive. It being certain that A was not to take the estate, it may have been the testator's wish, that it should go to any person rather than to A, and even to the Crown as *ultimus hæres*. The motives of the testator for taking the estate from A cannot be inquired into by a court of law. To do so would be to go against all the rules and principles of law, which regulate the transmission of land.

The deed of 1790, as well as those of 1803 and 1804, was repudiated by the sisters of the Duke. As therefore the deed of 1790, which excluded the pursuer, has been repudiated by the disponents, in whose favour the exclusion was made, the pursuer, as heir of investiture, is entitled to reduce the subsequent deeds, as having been executed on deathbed, and his right to do so is not barred by the former deed, as that deed having been repudiated is no longer effectual.

ARGUMENT FOR
TRUSTEE.

PLEADED FOR THE TRUSTEE.—The deed of 1790 was not revoked absolutely. The subsequent deeds contain no express revocation. It is said that it was revoked by implication. The whole question therefore turns upon the alleged identity of these two modes of revocation.

It is needless to argue, whether the same effect ought to have been given to an implied as is given to an express revocation. A positive rule has been established, and it cannot be abandoned for any speculation, however excellent. It is now a settled rule, that where there is no express revocation, it is the subsistence of the second deed that alone takes away the first. If, however, the second deed is reduced, the first remains. In the case of implied revocation, therefore, there is no revocation, except by the effective operation of the second deed, in favour of the new donee.

It is needless to refer to the civil law upon the subject. That law is an absolute stranger to all the principles on which the case depends. It is equally unnecessary to refer to the

rules which relate to the conveyance of moveable subjects by testamentary bequest. The present case has nothing to do with the principles which regulate moveable succession, but depends on the law which determines the efficacy of a disposition of land, when burdened by a faculty to alter, and attacked by an heir on the head of deathbed.

ROXBURGH
v.
WAUCHOP.
1820.

The sisters of the Duke did not repudiate the deed of 1790. In so far as related to those lands, the investitures of which were in favour of heirs-male, they founded upon it, and claimed these lands in virtue of that deed. As regarded these other lands which were destined to heirs whatsoever, they had a double title to them. They had right to them, both as heirs of investiture, and also as disponees under the deed of 1790. The judgment of the Court found, that in so far as regarded the lands *not* settled on them by the ancient investitures, they had no right to reduce the deeds of 1803 and 1804. This was virtually a finding that the deed 1790 was in force against them, because it was held to exclude them. The judgment for them, found, that in so far as regarded the lands which *were* settled upon them by the previous investitures, they were entitled to a decree of reduction. This finding proceeded merely on the ground, that the pursuers, having two titles in their person, had a right to proceed upon either of them they chose.

But further, it was not in the power of the Duke's sisters to repudiate the deed 1790. No person can repudiate a subject to which he has no right. The right given to the sisters of the Duke by the deed 1790, was taken away by the subsequent deeds. As they were not the heirs of investiture in those lands which were destined to heirs-male, they had no right to reduce the subsequent deeds. They consequently stood excluded by the subsequent deeds from all right to those lands to which their sole title was the deed of 1790. They had therefore no right under that deed, which they could repudiate.

LORD ALLOWAY, Ordinary, Found, " That John Duke of Rox-
burghe, when in *liege poustie*, conveyed his whole unentailed sub-
jects, of every description, to Lady Essex and Lady Mary Ker,
his sisters, and their heirs in fee-simple ; but with a destination,
upon the failure of his sisters and their heirs, to his heirs of

Interlocutor of
Lord Ordinary.
Feb. 18, 1814.

ROXBURGHE
v.
WAUCHOPE.
1820.

entail, and with a power to revoke and alter that deed, even upon deathbed : That the heirs of entail, in so far as they were the heirs of investiture of any parts of these lands, were completely excluded by that *liege poustie* deed in favour of his sisters : That Duke John afterwards executed, in 1803, a conveyance of his whole heritable subjects not limited by the entails to John Wauchope and James Dundas, as trustees, for the purposes therein mentioned : That upon the 17th March 1804, John Duke of Roxburghe, when upon deathbed, executed a deed of instructions, directing the trustees to distribute his whole heritable and moveable property, by paying certain legacies, and dividing the residue of his fortune among certain residuary legatees : That the right of challenging upon the head of deathbed is only competent to the next heir of investiture having an interest, and who, in virtue of the deathbed deed being set aside, would succeed to the lands and heritages therein contained : That if the deathbed deed in question were set aside, the deed 1790, which is not expressly revoked by the deathbed deed, must exclude the succession of the heirs of entail, and the pursuer, James Duke of Roxburghe, has no interest as the heir of the investiture to insist upon the reduction of the deathbed deed of 1804 ; and therefore, Assolizied the defenders from the general conclusions of the reduction."

JUDGMENT.
July 4, 1816.

The pursuer having Reclaimed, the Court " Adhered to the Interlocutor reclaimed against, in so far as it finds that the pursuer is barred by the deed 1790 from challenging the deathbed deed 1804 ; and that he has no right to challenge the said deed *ex capite lecti*, as to any lands to which he would have right as heir *alioqui successurus*."

The pursuer having again Reclaimed, the Court were equally divided. LORD GILLIES was accordingly called in, and having delivered his Opinion in favour of the former judgment, the Court " Adhered."

OPINIONS.
MS. Notes.
Baron Hume's
Session Papers.

LORD GILLIES observed,—“ The deed 1790 altered the previous destination to heirs of tailzie, and called heirs of line. The deed 1803, having appointed no uses of trust, was no alteration of the deed 1790. It was truly a deed in favour of the heirs of line. Then comes the deed of instructions. The heirs of tailzie

challenge it *ex capite lecti*. The defence is—You are excluded by deed 1790. The reply is twofold :—*First*, It is revoked. *Second*, It is repudiated. Now as to the first, it does not expressly revoke the deed 1790. If there had been an express revocation, the case must have been ruled by *Coutts v. Crawford* ; but being an implicit revocation, it is ruled by *Rowan v. Alexander*. That case settled that species of question. *Stare Decisis* is most material in matters of such nicety. In that light Lord Eldon viewed that decision in *Coutts*' case. Are we now to go back upon it ? But further, if *Rowan*'s case were now open for decision, I should be for deciding it in the same way. I think it a sound notion that the implied revocation is conditional, if the new settlement take effect—and otherwise, not. The pursuer cannot be allowed to plead in the same breath that the deed 1803 undoes the deed 1790, and that the deed 1803 is good for nothing—is no deed at all. If it is nothing, it cannot revoke anything.

ROXBURGH
v.
WAUCHOP.
1820.

“As to repudiation, I don't think that the ladies did repudiate it. On the contrary, they founded on the deed 1790 as an answer to the plea that their interest as heirs of line was excluded. They answered, and their answer was sustained, that it was a deed in their favour, and could not exclude them. It is true that they did not make up titles under it. But why ? Because they had no occasion, having another and more beneficial title as heirs of line. But that is something far short of repudiation. Besides, if they had repudiated, would that have extinguished the deed 1790 ? By no means. The right would have opened to the next substitute. So I am clear for adhering.”

The pursuer having Appealed, “It was Ordered and Adjudged, that the several Interlocutors complained of be Affirmed.”

House of Lords'
Journals, May
25, 1820.

LORD CHANCELLOR ELDON observed,—“As to the question of implied revocation, if we are to act on the maxim of *Stare Decisis*, the judgment cannot be disturbed. The deed in *liege poustie* reserves a power of revocation. By making another disposition under the authority of the power, it must be supposed that the disposer intended to do something effectual, and it cannot be implied that by the exercise of the power he meant to revoke it.”

Bligh's Re-
ports, vol. ii.,
p. 654.

1. The case of *KER v. KER*, January 25, 1677, reported by Lord Stair, was a case of implied revocation. In that case, two deeds executed on deathbed were sustained, on the ground that a prior deed, executed in *liege poustie*, which excluded the heir, had been recalled from the party who had the custody of it, not absolutely but *qualificate* only. The prior deed had been delivered into the custody of a third party, and the granter on his deathbed called for it, when it was redelivered to him. He then gave it to a notary, and subscribed two blank papers, and directed the notary to fill up both according to the first deed; the one in favour of his second son of one-half of the subjects, and the other in favour of his heir, the daughter of his eldest son deceased. The prior deed had been in favour of the son of his second son. The heir brought a reduction, and the defender PLEADED,—That the prior disposition was not absolutely recalled, but *qualificate et ad specialem effectum*, viz., To divide the right between the second son and the pursuer, who, therefore, could claim only one-half.

2. This plea was sustained. "The Lords found, That the disposer might, and had recalled it; and that if he had recalled it simply, the new disposition on deathbed would not have been effectual against Janet, his heir, seeing the heir, the wife and bairns are secured by the law *de lecto*; but having recalled it *specificate* and *ad qualificatum effectum*, to give Janet, the heir, the half, and Patrick the other

half; they therefore sustained the two dispositions though subscribed *in lecto*. But a disposition revocable to any other person might be recalled effectually *in lecto*. Neither could the heir quarrel the qualified revocation, but behoved either to accept it *in toto* as it was, or to reject it *in toto*, and thereby get nothing; the first disposition remaining effectual, which being *in liege poustie*, did absolutely exclude the heir."—*Stair's Decisions*, vol. ii. p. 499.

3. This case of *KER v. KER* is incorporated by Lord Stair as part of his *Institutes*. He observes, "The Lords found, That there being nothing proved expressed at the delivery, the recalling and the redelivery did import that the first delivery was not simple, to the behoof of the oye, making it irrevocable, but that it was conditional, to be delivered to the oye, if the disposer did not recall it; and that the recalling of it for a special effect, to divide the same betwixt his heir and the second son, was effectual, both against his oye, to whom he first disposed, and effectual against his heir as to the one-half, albeit the revocation was on deathbed, seeing thereby the heir had no prejudice but benefit, being formerly excluded by the disposition to the oye delivered in *liege poustie*."—*Stair*, 3, 4, 29.

4. In the case of *IRVING v. IRVING*, 1738, reported by LORD KILKERRAN, a father first disposed to a younger son, with a power to alter, and then disposed to the son of the younger son, with a substitution to the eldest son. Both these

deeds were granted *in liege poustie*. Hethen, when on deathbed, granted a third deed in favour of the dispo-
nee in the second deed, his heirs, or
assignees. The eldest son brought
a reduction both as heir-at-law and
as substitute under the second
deed. The Court found, that he
had no right to reduce, either as
heir of line, because of the first
disposition *in liege poustie*, or as
heir-substitute, because the insti-
tute in the second deed was not
prejudiced but benefited by the
deathbed deed.—*Kilkerran's Deci-
sions*, p. 145.

*A Settlement of Heritage may be Revoked by a deed valid by the law
of the place where it is executed, although not valid by the law of
Scotland.*

I.—DUNDAS v. DUNDAS.

IN 1764, Sir Laurence Dundas, in the marriage articles of May 21, 1788.
his son, the pursuer, bound himself to execute a conveyance
of certain lands for his son's liferent use, after his own death,
and in trust *quoad* the fee for the behoof of the heirs-male
of the marriage. Sir Laurence reserved to himself power to
carry on the line of succession by any deed of appointment
and nomination, and also to subject the lands to the fetters of
a strict entail. In pursuance of the obligation contained in
these marriage articles, a disposition was made out in 1767,
but it was never executed.

NARRATIVE.

In 1768, Sir Laurence executed a deed of entail of the whole
of his estates in Scotland, including not only those referred to
in the marriage articles of the pursuer, but also other estates
subsequently acquired by him. This deed proceeded upon the
narrative of the power reserved by him in the marriage articles,
and was in favour of the pursuer, whom failing to the heirs-male
of the body of the pursuer, and of various other substitutes.
The deed contained the following proviso, "That it shall be
lawful to me, at any time of my life, and even upon deathbed,
to revoke, alter, or change this present tailzie at my pleasure,
in so far as the same shall be consistent with the marriage
articles above mentioned, and the disposition and settlement

DUNDAS
v.
DUNDAS.
1788.

made by me, relative to, and in implement of the said articles."

In 1779, Sir Laurence, then residing in London, made his latter will in the English form as follows: "I do give, devise, and bequeath, unto my dear son, Thomas Dundas, all my real estate in England, Ireland, and Scotland, as also in the island of Dominica in the West Indies, and elsewhere, not included in the settlement made on his marriage, and all my personal property of every nature and kind soever."

The will also contained the following clause of revocation: "And I do hereby revoke all former and other wills by me heretofore made, and do constitute my dear son my sole executor of this my last will."

This will was found in the repositories of Sir Laurence at his death, enclosed in a sealed cover, on which was inscribed, "This is the last will and testament of me, L. D."

After the death of Sir Laurence, the pursuer brought an action of reduction and declarator, for the purpose of having the deed of entail reduced, and the whole estates comprehended by it, in so far as not contained in the marriage articles, declared to belong to him in fee-simple. This action was founded on the will of 1779, as containing a revocation of the entail of 1768, if not also as being a new conveyance of the subjects comprehended by it.

ARGUMENT FOR
PURSUER.

PLEADED FOR THE PURSUER.—By the principles of the feudal law, land cannot be regularly conveyed by testament. The deed of 1779 may therefore be thought to be not a proper deed for conveying heritable succession in Scotland. The present inquiry, however, is not, Whether the pursuer would be entitled, in virtue of that deed merely, to carry the subjects comprehended in it, if he had no other method of taking them up? The inquiry is, Whether that deed be effectual to put an end to any former deed, by which he might have been excluded or limited?

The pursuer is the heir-at-law of his father. It is enough for him to show that the entail 1768 does not stand in his way. In that case, he can take up the succession without regard to the entail, as nearest and lawful heir of his father by

the investitures, and he is under no necessity of connecting himself with the will of 1779, as containing a proper settlement in his favour.

DUNDAS
v.
DUNDAS.
1788.

That deed may be ill executed as a settlement, and may yet be good as a revocation. The one requires certain formalities to give it effect by the law of Scotland : the other requires no formalities at all, being a mere signification of intention. It is one thing to convey and another thing to revoke, and although a deed in the form of a latter will may be improper for the one, it may be perfectly good for the other. If a settlement is under the maker's own power, either by the deed itself, or by any clause of revocation contained in it, he is entitled to exercise this power by a revocation, executed in any form, or at any period of his life. A deed remaining under the granter's power, is a mere creature of his will. It confers no right upon any person, and it may be taken away at any time, even on deathbed, this being no act against the law of deathbed, but the reverse ; for the effect of it is to make the legal succession operate, or, which is the same thing, the succession by the investitures. This it does by removing out of the way a temporary obstruction, arising from a deed prejudicial to the heir, which being in the granter's power, he was at liberty to defeat at any time and in any manner.

Nothing more is necessary for a party revoking than to declare his will by any authentic deed ; and by the universal law of nations, a deed is sufficiently authentic, which is formal according to the law of the place where it is executed. A revocation is a mere will in the proper signification of the word, viz., a signification of the party's intention in a matter which is absolutely under his power. A revocation of a gratuitous deed of settlement, remaining subject to the granter's own will, is a deed of a very different nature from an actual settlement or conveyance of a land estate. The only purpose of it is to declare that the once intended settlement is departed from and is no longer to be effectual. The solemnities necessary for a deed of actual conveyance are therefore not required. If the deed meant to be revoked is at the time in the actual possession of the granter, he has nothing to do but to cancel it, or put it into the fire. If, again, it happens

DUNDAS
v.
DUNDAS.
1788.

to be lying in his repositories at a distance, or in the hands of a depositary, it is sufficient that he declare his intention to set it aside, by a writing framed agreeably to the law of the country where he is living at the time.

By the devising clause of the testament, the testator clearly intended to give to the pursuer in fee-simple all his real estates, wherever situated, with the exception of those contained in the marriage articles. By real estate in Scotland, he meant his lands in Scotland, which indeed is the legal and natural import of the phrase itself. This new devise to the pursuer in fee-simple was of itself a virtual revocation of any former settlement of the estate. But not satisfied with a mere *implied* or *virtual* revocation, Sir Laurence also subjoins an express clause revoking *all former and other wills* made by him, *i.e.*, all former deeds respecting those estates. Sir Laurence uses the word "will," thinking that every settlement was a "will," and not knowing or adverting that there was any distinction as to the mode of expression in Scotland more than in England. In point of fact, Sir Laurence had never executed any former wills respecting his moveable succession, neither had he executed any deed respecting his landed estates other than the tailzie 1768.

In this question of intention, the language of the whole deed must be considered. The person by whom it was framed, being a stranger to the law and practice of Scotland, seems to have been unacquainted with the technical words and forms of a settlement of heritable succession in Scotland. But there cannot be a doubt that he intended to include the whole of Sir Laurence's landed property *wherever* situated. By the deed of entail 1768, the pursuer was constituted a liferenter merely. One of the purposes of the will was to alter and enlarge that right into an absolute fee.

ARGUMENT FOR
DEFENDERS.

PLEADED FOR THE DEFENDERS.—Two separate questions occur ; *First*, Whether Sir Laurence intended to revoke the entail which he executed in 1768 ? and, *Second*, Whether that intention has been properly and legally carried into execution ?

In fair and sound construction, there is nothing in the will derogatory to the entail. The object of the will evidently was to provide his lady in a considerable annuity, and to give certain other annuities and legacies to some other persons, and to

secure these annuities and legacies upon his whole estate wherever situated. This naturally led him to mention the pursuer, his only son, who was to succeed him by the entail already made, and it was natural for Sir Laurence, when he was laying burdens upon the pursuer, to make a general bequest in his favour. This bequest, therefore, instead of being held a revocation of the former deed of settlement, ought to be construed so as to be consistent with it.

The word *will*, employed in the last clause of the testament revoking all former wills, cannot be held to comprehend an entail settling a large estate upon a certain series of heirs, and put upon the record. Had Sir Laurence intended to revoke the entail, he would have used the word settlement in this clause as well as in the preceding one of general devise, for he had at that moment the difference between a *will*, properly so called, and a settlement, under his eye. The marriage-contract is called a settlement, and the entail certainly deserves that appellation as well as the marriage-contract. It is plain, therefore, that by *will*, Sir Laurence meant a deed properly so called, that is, a *testament*, and it was only these which he meant to revoke. A deed of entail is not a *will* any more than it is a bill or a bond.

Had the will been made in Scotland, it must have been held null. It is destitute of the solemnities required by the law of Scotland. It is not holograph of Sir Laurence, neither does it express the name and designation of the writer, nor those of the witnesses. The question therefore is, Whether the circumstance of Sir Laurence being out of Scotland when the will was executed is to alter the rule of judgment? In short, the question is, Whether the *solemnia loci* where the deed was executed, or those established by the law of Scotland, are to be considered, in determining upon the validity of deeds, the direct and immediate object of which is to make settlements, or to alter or annul settlements already made, so as to affect and regulate the succession of landed property in Scotland?

The question is certainly one of very general importance. For the same effect that is given to an English will, must be extended to a will made in France, Turkey, or the remotest corner of the world. So that if the question is determined in

DUNDAS
v.
DUNDAS.
1788.

DUNDAS
v.
DUNDAS.
1788.

one way, the succession to landed property in Scotland may be made to depend upon the validity and import of a deed executed in China or Japan, according to the forms there prevalent, however absurd and different from those solemnities prescribed by the law of Scotland.

By the law of Scotland, no distinction is made as to the essential formalities between deeds *SETTLING* a destination of land property, or *REVOKING* a settlement formerly made, or *creating* a burden upon land, or *DISCHARGING* that burden. The universal rule is, *UNUMQUODQUE EODEM MODO DISSOLVITUR QUO COLLIGATUR*. A right of succession, or any other right constituted by a formal writing, cannot be taken away or impaired by any deed that is not equally formal.

JUDGMENT.
Feb. 25, 1788.

The Lords Found,—“ That the deed of entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas upon the 14th of February 1779 ; and therefore find, that the pursuer and the son of his marriage with Lady Charlotte Fitzwilliam, are entitled to hold, possess, and enjoy the lands and estate settled upon them in the marriage articles libelled on, and that in terms of the obligation therein contained, granted by the said Sir Laurence Dundas, subject always to the reservations, conditions, and limitations therein expressed : And also, that the said pursuer is entitled to hold, possess, and enjoy the Earldom of Orkney and Lordship of Shetland, with the whole other lands and heritable subjects specified in the said deed of tailzie, and not contained in the said marriage articles, and that in fee-simple as heir of line in general, served and retoured to his father as libelled, and to make up and expedite his titles in that character accordingly : And decern and declare accordingly.”

OPINIONS.
MS. Notes.
Sir Ilay Campbell's Session
Papers.

LORD BRAXFIELD observed,—“ Virtual revocation would not do, because that depends on the validity of the last deed. But here an express revocation. Not a proper settlement, but a revocation. A revocation may be executed in any form—only a declaration of will. Suppose I give a power of attorney to a person to go to my house in Scotland, to take out the deed and burn it, no objection that power of attorney was not executed according to the forms of Scotland. Enough if a probative deed.”

LORD PRESIDENT DUNDAS.—“Revocation good. It is clear what was meant by the word ‘will.’”

The defender having Reclaimed, the Court “Adhered.”

LORD JUSTICE-CLERK MILLER.—“I doubt as to lands in marriage articles, because those excepted in devising clause. He might have had good reason for abiding by his entail as to lands in marriage-contract.”

LORD BRAXFIELD. — “If it stood on implied revocation, it would not do. Second settlement must be good in order to extinguish the first. But here an express revocation, and although an exception in the devising clause, he makes no exception in the revoking clause. Good reason. He had right to put an end to the entail as to whole. But he could not devise in fee-simple what he had settled in the marriage articles.”

LORD PRESIDENT DUNDAS.—“Reason of exception in devise was that contract should be the rule. Then comes clause of revocation as to whole, because Sir Thomas is to take the whole, either in fee-simple or by contract. English deed not good to settle, but good enough to take away. Succession is not taken under that deed.”

LORD HENDERLAND. — “The will consists of two parts. *First*, Bequest in fee-simple. This not good by law of Scotland, and not an implied revocation. As to *second* part, if I could construe the word *will* so as to revoke an *entail*, I would give it effect ; but I cannot take this upon me.”

“JUSTICE-CLERK and HAILES were for altering as to lands in marriage articles, and HENDERLAND as to whole.”

The Defender having Appealed, it was Ordered and Adjudged, “That the Interlocutors complained of be Reversed, in so far as they find, that the deed of entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas on the 14th February 1779 : And that the Cause be remitted back to the Court of Session in Scotland, to carry this judgment into execution.”

LORD THURLOW observed,—“Question is, Whether the instrument in form of a will is to be held as sufficient execution of the power reserved by Sir Laurence to revoke settlements in Scotland or elsewhere ?

DUNDAS
v.
DUNDAS.

1783.

JUDGMENT.
March 11, 1783.
OPINIONS.
MS. Notes.
Sir Ilay Campbell's Session Papers.

MS. Notes.
Sir Ilay Campbell's Session Papers.

MS. Notes.
Sir Ilay Campbell's Session Papers.

MS. Notes.
Sir Ilay Campbell's Session Papers.

JUDGMENT.
House of Lords,
May 21, 1783.

OPINION OF
LORD THURLOW.
MS. Notes.
Sir Ilay Campbell's Session Papers.

DUNDAS
v.
DUNDAS.
1788.
OPINION OF
LORD THURLOW.
MS. Notes.
Sir Ilay Camp-
bell's Session
Papers.

“Unnecessary to determine the question, Whether this will is a probative deed or not in Scotland? An instrument respecting movable or personal property is good, if executed according to the law of the place where it was made. But if it respects immovable property, *lex loci rei sitæ* is the rule. This case is not precisely the same with either of these. But I give no opinion upon it.

“A testament is not good by law of Scotland to convey land; but, supposing it were, the will here in question would not be sufficient, even in England, to revoke the deed formerly made. The deed of entail, although expressly revocable, declares that it shall stand good, unless taken away by a deed under his hand. The natural way of doing this was by recalling the instrument, and saying explicitly, ‘I revoke such a deed.’ If he had no other estate in the world, the general words might be sufficient, because they could apply to nothing else. But if he had an acre of other lands in the world, the general words must be applied only to these. We can only adopt an implied revocation *ex necessitate*. We cannot raise conjectures out of the deed itself. No doubt, we must take his own meaning of the words; but the expression ‘other wills,’ means other instruments of a similar nature—other testamentary acts—not special settlements of a particular estate. Such general sweeping words do not affect estates specially settled. Upon this ground, the interlocutor ought to be reversed.”

II.—LANG v. WHYTLOW.

Feb. 20, 1810.
NARRATIVE.

Thomas Whytlow was proprietor of heritable property, both in Scotland and in Jamaica. In 1803, he executed a trust-disposition and settlement, by which he conveyed to trustees all his property, heritable and moveable, then belonging, or which might belong to him at the time of his death. The *fifth* purpose of the trust was to make payment to his wife, Agnes Lang, in case she should survive him, of the sum of £1000, which was declared to be over and above the provision in her contract of marriage. The *last* purpose of the trust was to invest and

LANG
C.
WHYTLAW.
1810.

the whole free remainder and residue of the trust-estate for the life of the truster's wife, in case she should survive him; and the fee to be invested and secured for behoof of the children *nominatim* of John Græme, and of the children *nominatim* of James Henderson, by Janet Græme, his spouse. The trustees were authorized and empowered to sell such parts of the trust-estate as they might see proper, for more effectually executing the purposes of the trust.

Of the same date with the trust-settlement, the truster executed a will and testament in the English form, by which he conveyed to his trustees all his real and moveable property in the island of Jamaica, or elsewhere, which then belonged or which might belong to him at the time of his death. The will proceeded on the narrative, that the testator had that day executed a settlement of his affairs in case of his death, according to the forms observed by the law of Scotland; but that having likewise considerable property in the island of Jamaica and elsewhere, which it was his intention should be comprehended by the said deed of settlement; and, in order that no obstacle might occur to the recovery of his fortune and estate in the said island, or wherever else the same might be situated, he had thought it proper, for the greater security, to execute this collateral and supplemental deed. The trustees were appointed to apply the funds recovered by them to the purposes directed in the deed of settlement.

The testament concluded in these terms: "And this I publish and declare to be a supplemental and integral part of my last will and testament, which I now make and execute, with the intention of fulfilling the forms of the English law, and the more easily to enable the persons above named to recover and receive all such part or parts of my fortune, means, and estate, as may be out of Scotland at the time of my death."

In 1805, while resident in Jamaica, the truster executed a will in the English form. The narrative was as follows:—"Being sick and weak of body, but of sound mind, memory, and understanding, I do make, publish, and declare this my last will and testament, in manner and form following: Whereas I formerly made and published in due form of law my last will and testament, immediately previous to my departure from Glasgow to this Island; the exact date whereof I do not recol-

LANG
v.
WHYTLOW.
1810.

lect, but I think it bears date some time between the fifth and twelfth days of the month of December, in the year of our Lord 1803 ; and thereby constituted and appointed my dear wife, Agnes Lang, &c., my executrix and executors and managers of my estate and affairs, I do hereby revoke, annul, and declare absolutely void and of no effect the said last will and testament and disposition of my estate and effects, to all intents and purposes."

By this deed, after bequeathing legacies to some of the persons named in the deed of settlement, the whole residue was bequeathed by the truster to his wife. His wife was also appointed sole executrix of the will in Great Britain, and a friend residing in Kingston was appointed executor of it in Jamaica. The will concluded in these terms—"And I hereby revoke and declare null and void all my other wills or will by me at any time heretofore made, and declare this only to be and contain my last will and testament and disposition of all and every of my estate and affairs in this island and elsewhere, wherever the same is or may be situated at the time of my death."

The truster died a few days after the execution of this deed. His sisters, Elizabeth and Jean Whytlaw, expedite a general service to him as his nearest heirs-at-law, and brought an action of reduction for setting aside both the trust-disposition of 1803 and the will executed in Jamaica in 1804, in so far as they related to heritage in Scotland, the first upon the ground of its being effectually revoked, and the second as being of a testamentary nature, as destitute of the proper solemnities, and as executed on deathbed.

The widow of the truster also brought a counter action for declaring her right under the original trust-deed, and for reducing the service of his sisters. Both actions were brought before Lord Armadale as Ordinary.

Interlocutor of
Lord Ordinary,
July 2, 1807.

LORD ARMADALE Found,—“That the trust-disposition and settlement by Thomas Whytlaw, of date 9th December 1803, and supplementary deed of said date, were effectually revoked by the deed executed by the said Thomas Whytlaw in Jamaica in October 1805 : But finds, That said deed executed in October 1805 was ineffectual as a deed on deathbed, and as a deed in a testamentary form, to convey an heritable estate in Scotland :

And therefore sustains the reasons of reduction, in the action insisted in by Elizabeth and Jean Whytlaw, the heirs-at-law of Thomas Whytlaw, in so far as regards the heritable estate in Scotland of the said Thomas Whytlaw: And to that extent Assoilzies the said heirs-at-law from the counter action, at the instance of Agnes Lang, the widow of Thomas Whytlaw, and Decerns."

LANG
v.
WHYTLAW.
1810.

The widow Reclaimed. On Advising her Petition along with the Answers for the heirs-at-law, it was suggested that some of the points involved in the case were of such general importance, as to deserve still more consideration than they had already received in the written pleadings of the parties. A Hearing was accordingly appointed, and counsel were thereafter heard. After the Hearing, Memorials were ordered by the Court.

Interlocutor
Ordering Hear-
ing.
Dec. 2, 1808.

Interlocutor
Ordering Me-
morials.
June 2, 1809.

PLEADED FOR THE WIDOW.—Every country has established a test for itself, by which to judge of the authenticity of writings relating to land rights, and to prevent litigation, has declared that no equivalent test shall be regarded. The nature of the thing admits of a fixed, permanent, and universal rule, having no regard to the domicile of the person executing the instrument, but merely to the local situation of the property, from which it can never be removed. All disputes respecting rights to land must necessarily be determined by the judge within whose jurisdiction it lies. No instrument therefore affecting any right to land can be permitted by him to have the smallest operation, unless executed with every solemnity of the *lex loci rei sitæ*. The rule established in Scotland comprehends, and was intended to comprehend, every species of instruments by which rights to land could be affected, modified, or altered in the smallest degree.

ARGUMENT FOR
THE WIDOW.

A revocation operates precisely in the same manner as a direct conveyance. If a party were to make two settlements of his estates at different times, and in favour of different disponees, and the last settlement were to contain a revocation of the first, and he were afterwards to execute a simple revocation of the second settlement, and all these instruments were found in his repositories at his death, the simple revocation would operate as a disposition of his estate in favour of the first disponee. In

LANG
v.
WHYTLAW.
1810.

such a case, ought not so important a deed to be executed with all the solemnities of the law of Scotland? There exists, however, no difference between that case and the one now under consideration.

Every writing importing a revocation of a previous regular settlement of a landed estate in Scotland, must be executed with the same formalities as the original deed, according to the rule—*UNUMQUODQUE EODEM MODO DISSOLVITUR QUO COLLIGATUR*. A revocation, it is true, is a mere declaration of will; and there are other modes of taking a prior deed out of the way, besides that of revoking by a written instrument. If this mode, however, be adopted by a party to declare his will, the writing alleged to contain the declaration must be not only clearly expressed, but also authenticated by the solemnities prescribed by the law of Scotland. A very few words holograph of the granter are sufficient by that law to give effect to the declaration. But deeds of revocation not holograph must be judged of by the general test which is provided for writings which affect heritable rights.

Independently of the plea, that the will executed in Jamaica was insufficient to revoke the trust-settlement, on the ground that it is not probative by the law of Scotland, another plea remains, that the trust-deed was not revoked by the will, inasmuch as it contains no express words of revocation applicable to that deed. General words of revocation are not sufficient. An express revocation of the trust-deed is necessary. This plea is supported by the doctrine laid down by Lord Thurlow in the House of Lords, in the case of *Dundas v. Dundas*. His Lordship observed in that case,—“ We can only adopt the implied revocation *ex necessitate*; we cannot raise conjectures out of the deed itself.”

The clause of revocation contained in the Jamaica will is also void, as being contained in a void settlement. The revocation is conditional on the deed of conveyance, in which it is contained, being effectual as a conveyance. No disposition, although containing a revocation in the most express terms of a prior disposition or settlement, is effectual, unless the disposition, in contemplation of which the revocation is made, shall at the same time be effectual and operative.

PLEADED FOR THE HEIR-AT-LAW.—The important question in the case is, Whether a revocation of a regular settlement of Scots heritage can be effected by a deed not executed with the solemnities required by the law of Scotland for the transmission of heritage ?

LANG
v.
WHITLAW.
1810.
ARGUMENT FOR
HEIR-AT-LAW.

A revocable settlement has no operation until it ceases to be revocable, either by delivery, if it be not qualified by a power of revocation, or by the death of the granter. Its proper and legal date is the date of its becoming irrevocable. Up to that period it has no effectual existence, however formally executed. It gives no right, and divests no right. It is no better than an intention in the mind of the granter.

The donee in a revocable settlement has no right to the estate under it while the granter continues to live. Neither is the natural right of the heir-at-law affected by its mere execution. That right, therefore, is neither restored nor created by the deed of revocation, but emerges and takes effect of itself, without reference to any deed, as soon as the ancestor expires, and it appears that there is no subsisting deed by which he can be excluded. All that is proved by a revocable settlement is an intention to convey land in favour of a party. A deed of revocation, therefore, does not affect heritage in any degree. It merely indicates, that the intention to affect it was abandoned, and did not subsist long enough to produce any legal operation.

An alteration of intention is all that is implied in the annulling of revocable settlements. The most common and effectual way of revoking a deed, is by burning, cancelling, or tearing, without witnesses, memorandum, docket, or solemnity of any kind. So long as a man can stir his finger, he can exercise this power of revocation, while the deed is in his own custody, just as readily and effectually as he can alter his intention. If the deed is not in his own custody, he can accomplish the same end by sending a verbal message to the person who has it, to burn or cancel it. Or, if he chooses to employ writing, a signed letter or mandate, or power of attorney to the same effect would be perfectly sufficient. By any one of these acts, he testifies that his former intention is abandoned, and that his intention now is, not to make the alteration which he had once meditated in the succession to his estate. Whatever expresses this intention

LANG
v.
WHYTLOW.
1810.

in an authentic and credible form must be received as sufficient evidence of it, and the peculiar solemnities of the Act 1681 are not requisite.

A revocable settlement is just as much the property of the maker as any book or article of furniture in his possession. He may burn it or tear it himself, or direct any one else to burn it or tear it, just as certainly and with as little ceremony as he could dispose of a pack of cards, or an old almanac. It is to him nothing more than a piece of written parchment or paper, which is his property. There is nothing in the tenor of the writing that can affect him, or limit his power of disposing of it according to his pleasure. It is strictly, and legally, nothing more than a moveable property of very trifling nature. Whatever he chooses to order with respect to it, either in an English will, or by an English power of attorney, or mandate, or missive letter, must be executed and carried into effect as implicitly as any orders given in a similar manner with relation to any other part of his property. The tenor of the deed so disposed of can never affect the owner's power of disposal. He is not bound by its execution, nor is there any sort of right created in any body by its mere subsistence. The trust-deed in question, therefore, which was only intended to take effect on the granter's death, was validly and effectually revoked by the will executed in Jamaica in 1805.

JUDGMENT.
Nov. 16, 1809.

The Court pronounced the following Judgment:—"The Lords having advised the mutual memorials for the parties, and whole cause, they Alter the interlocutor of the Lord Ordinary, Repel the Objections to the revocation contained in the deed executed in Jamaica in October 1805, in so far as the same are founded upon the want of statutory solemnities : But Find that the said deed is not to be held an effectual revocation of the trust-disposition and settlement executed in 1803, in so far as Agnes Lang has interest therein : Therefore Assoilzies her from the conclusions of the action of reduction at the instance of the Misses Whytlaw, and decern : And in the action of declarator at the instance of the said Mrs. Agnes Lang, Find and Declare, that the trust-deed and settlement 1803 is a valid and effectual deed, so far as she can claim interest or provision thereby, and decern."

LORD HERMAND observed,—“ The first deed is conditional, if not revoked, without relation to form. The Jamaica deed enumerates his landed property. Revocation relates to both prior deeds, both will and disposition, revokes estates wherever situated. As to the form of revocation, I lay much weight on the clause reserving power to revoke. It is like the condition *Si Romam venerit*. The deed has no effect till death. May revoke by any declaration of will, especially if according to the form of *lex loci*. As to decision of Barclay’s case, the doubts afterwards entertained did not relate to that point. As to Dundas’ case, it went on circumstances—not on the general point of want of solemnities. In Auchterlony’s case, the English will was supported. In the Roxburghe case, defect was not in form, but in want of power. As to Henderson and Wilson, an intricate question, and not clear whether well decided. In Cunningham v. Gainer, there was but one deed, so approbate applied. The case of Crawford v. Coutts applies here.”

LANG
v.
WHYTLOW.
1810.

OPINIONS.
MS. Notes.
Baron Hume’s
Session Papers.

LORD CRAIG observed,—“ There are three questions here. *First*, Does the revocation apply to *all* the deeds? *Second*, Is it good in point of form? *Third*, What the effect of sustaining the objection? As to *first*, I think the words apply to all the deeds. *Second*, Nice and difficult. But, on whole, I think that revocation and disposition don’t go by one rule. One alienates and conveys from the heir, the other declares will only, and restores. It don’t touch the lands, but says, that *now* no such former deed. May be done by cancelling, burning, &c.; and this by an order to a third party. This notion has been admitted by the Court in Barclay’s case. Case of Dundas reversed on other grounds. *Third*, This revocation made not to hurt, but improve the wife’s right. It makes her *fiar* instead of *liferenter*. Strange that the result of both deeds in her favour is to take away both *liferent* and *fee*. I cannot go that length. So think the effect is to restore her to *liferent*. As to Coutts’ case, it was quite different; the right of the first donee there being quite taken away.”

MS. Notes.
Baron Hume’s
Session Papers.

LORD BANNATYNE observed,—“ I am disposed to lean to the sustaining of our own forms of deeds. But I doubt whether that rule applies to a deed of revocation, which does not establish a title to lands. It may be done by matter of fact, cancelling,

MS. Notes.
Baron Hume’s
Session Papers.

LANG
v.
WHYTILAW.
1810.

burning, &c. If so, by an informal deed. It has been held so by judgments. In the case of Dundas, House of Lords declined to decide that point. As to the effect, I admit the hardship of taking all away by means of the two deeds, but there is no help for it. If the revocation here is effectual to do away the trust-right, her interest under that trust must fall."

MS. Notes.
Baron Hume's
Session Papers.

LORD WOODHOUSELEE observed,—“ A sufficient declaration of will, good by *lex loci*, is, I think, sufficient to revoke. Statutes relate to deeds of settlement. Power to cancel, burn, &c., implies power to revoke without form. To do it formally may be out of the testator's power for want of Scots writer. As to the result, I am of opinion, though hard, that it is to the entire disappointment of the widow.”

MS. Notes.
Baron Hume's
Session Papers.

LORD SUCCOTH observed,—“ I doubt whether the revocation relates, legally, to the trust-deed of heritage. As to the question of form ; I agree that a writ of revocation may be good, though insufficient to convey, by reason of want of form. There is no precise form of revocation. It may be done by a letter, by cancelling, burning, &c. I don't enter into the notion that every writing at all relative to heritage must be formal. There are many which need not. In Sir Thomas Dundas' case, it was so held, and not found otherwise in the House of Lords. As to Barclay it is not adverse to principle in case of Dundas. Had it not been for the holograph declaration, the judgment would have been otherwise. Interlocutor finds expressly that declaration of will is good though the conveyance insufficient. Even if the question were open, I should be of that opinion. Lord Thurlow did not decide the question of form.”

MS. Notes.
Lord President
Blair's Note-
Book.

LORD PRESIDENT BLAIR has made the following entry in his Note-Book :—“ Thomas Whytlaw, proprietor of some heritable subjects about Glasgow, and likewise of an estate in Jamaica, executed a disposition 9th December 1803, in the Scots form, conveying his heritable subjects therein described, and likewise all other lands and moveables, to certain trustees, for payment of his debts and other purposes ; ‘ After which I appoint my trustees to invest and secure the whole free remainder and residue of my fortune, means, and estate, for the liferent use of my said spouse, Agnes Lang,’ &c. Of the same date, he executed a last will and testament in the English form, for the

purpose of recovering the effects in Jamaica, and applying them in terms of the disposition. A will executed in Jamaica, 7th October 1805, revoking the former will and disposition, 'and appointing of new my said wife my sole executrix and universal heir to the above narrated property.' Another will in the English form, October 1805, revoking all former wills, 'and all the rest, residue, and remainder of my estate, real, personal, or mixt, whatever or wheresoever the same may be situated, I give, desire, and bequeath unto my said dear wife, Agnes Lang, to hold the same.' Action brought at the instance of Agnes Lang, the widow, concluding to have it found and declared, *first*, That the wills in Jamaica are effectual to convey the heritage in Scotland; or, *second*, That she shall at least be found entitled to what is provided to her by the disposition and will of 9th December 1803. Lord Ordinary has found that the settlements of 9th December 1803 were effectually revoked by the Jamaica wills, and that this last being upon deathbed, and in a testamentary form, is not effectual to convey heritage in Scotland, and therefore preferring the heir-at-law.

LANG
v.
WHYTLAW.
1810.

"Merits of the case depend materially upon the validity and effect of the will executed by Mr. Whytlaw in Jamaica, in October 1805. Three questions have been argued by the parties. *First*, The validity of this will, which has none of the formalities of the Scots law, to be a revocation of a trust-deed or settlement of heritable estate situated in Scotland? *Second*, Construction of this deed, whether it was meant to revoke the Scots trust-deed? *Third*, The effect of such revocation, supposing it shall be held to comprehend the Scots trust-deed? First question is, from its nature, preliminary, and if determined in one way, supersedes the other.

"For Mrs. Whytlaw maintained, that every deed relative to the succession of land in Scotland, whether a settlement or a revocation of existing settlements, must be executed according to statute law of Scotland. On the other hand, maintained that a revocation is in a different situation from a settlement, and may be executed without any form, at least without the formalities required by the law of Scotland.

"Is this question still open, or is it fixed by former decisions? Case of *Barclay*, in 1751, and case of *Sir Thomas*

LANG
v.
WEYTLAW.
1810.

Dundas, in 1783. In the first, the objection of the will at Buenos Ayres not having the solemnities of the law of Scotland not stated, nor considered by the Court. Seems to have been supposed holograph. And the judgment finding it a good settlement goes farther than is here maintained. In the case of Lord Dundas, the point was argued, and decided by the Court. An English will, which had none of the solemnities required by the Scots law, found a valid revocation of a Scots entail. This case reversed in the House of Lords, not upon the objection to form, but on a separate ground. From the notes of the Chancellor's opinion, printed by both parties, it appears that he considered the point of form, and the circumstance of the will not being probative by the law of Scotland as still open, and with regard to which declined giving any opinion.

"Under these circumstances, I cannot think that the judgment can be considered as fixing a question of law of very general importance, or to relieve the Court from the necessity of considering it. General question may be considered in two views. *First*, Where the revocation or deed containing revocation is executed in Scotland; and, *Second*, Where it has been executed in a different country, as in Jamaica. According to the first view,—Supposing revocation executed in Scotland, is there any thing in the Statutes establishing the solemnities upon which it can be said that revocations meant to be exempted? One of the oldest Acts, 1579, mentions deeds importing heritable title, and obligations of importance. Accordingly, systematic writers mention the classes of writings where all the solemnities are requisite. Deeds affecting heritage, and deeds of importance, when subject is above £100 Scots. Does a revocation of the settlement of a land estate belong to one or other of these classes? I think it belongs to both.

"A great deal of ingenious argument to show that a revocation does not affect heritage; and, in one sense of the word, no writ affects the land itself. But it affects the rights, the property, and the succession of the land. Is there any deed which in this sense affects land more strongly than a revocation, and makes the succession go differently from what it would otherwise do? Pursuers suppose that the only effect of a revocation is to make the succession fall to the heir-at-law, which of itself

would be sufficient to make it a deed affecting heritage. But this depends upon circumstances. Suppose two or three settlements executed, and the last only revoked. This gives effect to the prior settlement, not to the heir-at-law. As to revocation being a deed of importance, cannot be contradicted. What is the object of solemnities, but to secure against false and forged deeds, not a restraint upon proprietors, but a security to their will? Is the temptation to forge less in the case of revocation, or the doing of it more difficult? In fact rather easier. A revocation is a simple deed; may consist of a few lines; where forgery is easier, and detection more difficult. There are certain deeds mentioned by lawyers which are exempted from the statutory solemnities—privileged writings. They are enumerated,—holograph writings—deeds in *re mercatoria*. But no person has ever said that deeds of revocation were of that number; are uniformly executed in the same form with other deeds of importance.

“Observed, that deeds may be revoked without any solemnity at all. Certainly very true, that a person may do what is equivalent by destroying the deed. A person may put his deed in the fire, may tear away his name or cancel it. When this is done, the deed ceases to exist as if it never had been, unless it can be proved that the destruction was accidental, or by some person who had no power over it, in which case it may be restored by proving of the tenor. When a deed is revoked *via facti*, there is no necessity for a deed solemn or not solemn. But when the settlement exists, it can only be taken away by a contrary deed, and no reason why that deed should be exempted from the statutory forms of law.

“Does it make any difference upon the question, that the deed containing the revocation was executed in Jamaica, and was valid according to the *lex loci*? In this matter, the law of Scotland has adopted a distinction, which is agreeable to sound principles of jurisprudence, and is generally received. Betwixt moveable property, which has no permanent *situs*, and land property, which is part of the *terra firma*. With regard to the succession of the former, whether testamentary or *ab intestato*, the law of Scotland has no authority, unless the proprietor is a domiciled Scotsman at the time of his death. Hence a testament executed according to the *lex loci*, is sustained effectual

LANG
v.
WHITLAW.
1810.

LANG
v.
WHYTLAW.
1810.

here, and *ab intestato* succession of moveables in Scotland is regulated by the law of domicile. But with respect to heritage which has a permanent *situs*, whether the succession is by deed or by law, the law of Scotland alone disposes of it. In this very case, pursuers' plea is founded upon the idea, that the law of Scotland governs a will executed in Jamaica, otherwise how can they found upon the law of deathbed, which the law of Jamaica knows nothing about? Will it be said, that the law of Scotland, while it governs the substance of deeds concerning heritage executed abroad, does not regulate the form? The reverse of this clearly established. A testament in the English form ineffectual to convey an heritable bond in Scotland. Many instances of this; must therefore ultimately come to the doctrine already considered, that by the law of Scotland, deeds of revocation are exempted from the statutory solemnities, which I do not think well founded.

"Supposing the objections to the validity considered as a revocation of the settlements of a Scots estate to be obviated, questions still remain, *First*, as to construction of the deed, Whether the revoking words extend to the trust-deed in 1803? *Second*, as to the legal effect of such revocation. As to the *first*, I have little doubt,—a revocation requires no particular form of words. Only necessary that the will of the party be expressed with sufficient clearness. The words had in view the revocation of the trust-deed. *Second*, as to effect of revocation, more difficult. A long argument maintained for Mrs. Whytlaw, to show that if this English will is not to have complete effect as a settlement, that neither ought it to be sustained as a revocation. This doubtful. A man may be willing to revoke former deeds, even although new settlement should not stand. This is the legal presumption. Cases of deathbed. But the peculiarity here is, that the deed revoking, and the deed revoked, are to a certain extent in favour of the same person. The first deed gives Mrs. Whytlaw the liferent, and second gives her the fee. Can a deed giving the fee be construed to take away from her the liferent? This would be allowing one clause of a deed to defeat the express will declared in the same deed. If the former deed had been in favour of a different person, then there might be room for

presumption, that it was meant at all events to put out of the way the former deed. But in this case there is no room for presumption. Express will that she should at least enjoy the subjects during her life. Case of Crawford.”

LANG
v.
WHYTLAW.
1810.

The Residuary Disponees and the Special Legatees under the trust-disposition of 1803, had hitherto taken no part in the action, but had left the widow, who was one of the trustees named in that deed, to defend it. As, however, the judgment of the Court separated their interests from those of the widow, the residuary disponees and special legatees Reclaimed against the interlocutor, both on the general grounds formerly urged, and also on the ground that there was no sufficient reason for distinguishing their case from that of the widow.

APPEARANCE
FOR RESIDUARY
DISPONEES AND
SPECIAL LEGA-
TEES.

PLEADED FOR THE RESIDUARY DISPONEES, AND THE SPECIAL LEGATEES.—By the judgment of the Court, it is held that because the purpose of the revocation was to increase the interest of the widow in the succession to her husband's estate, and not to cut her off from any of the provisions formerly made in her favour, it was not to be considered as an effectual revocation, in so far as her interest was concerned. If, therefore, the provisions contained in a prior deed be *less* than those contained in the revoking deed, the party favoured is entitled to claim under the first deed. It remains, however, to be determined, whether, when the provisions of the original deed are *greater* than those contained in the revoking deed, the party favoured is to be excluded altogether.

ARGUMENT FOR
RESIDUARY
DISPONEES, AND
SPECIAL LEGA-
TEES.

By the trust-disposition, the sum of one hundred guineas was left Mrs. Montgomery, and the sum of five hundred guineas to Mrs. M'Farlane. By the Jamaica will, these legacies were reduced to fifty and one hundred guineas. Upon the same principle that the widow has been found entitled to her legacy of £1000, and her liferent of the residue, these legatees are entitled to insist that the trust-deed *as to them* has not been effectually revoked. These legatees are named in both settlements, and have rights under both, just as Mrs. Whytlaw had, though to a more limited extent. The principle of the interlocutor must apply equally to them as to her, since the last deed

LANG
v.
WHYTLAW.
1810.

cannot surely be held to be a revocation as to them, in so far as it renews legacies to them contained in the first deed.

The same principle seems also to apply to all the persons interested in the first deed, although the provisions in their favour are not renewed by the last deed. If the question as to the validity of the revocation can be affected or controlled in any degree by the intention of the testator, there can be no room for splitting the intention into two parts, and giving the widow *part* of what was intended by the Jamaica will, in consequence of the previous trust-deed, and giving to the heirs-at-law the *other part* at the expense of the special legatees and the residuary disponees, some of whom as well as the widow were favoured by both deeds. It is clear that the heirs-at-law were not intended to be favoured by either deed beyond the annuity provided to them. It is equally clear that by the trust-deed, the *fee* of the residue was destined to the children of Messrs. Henderson and Græme. The Jamaica will was intended to give that fee to Mrs. Whytlaw in place of them. But because that intention has not been carried into execution in an effectual manner, it does not follow that the testator intended to give the fee to his heirs-at-law. There is no room for the legal presumption that the testator meant to open the succession to them. By the Jamaica will, it was intended that Mrs. Whytlaw should gain what the special legatees and residuary disponees were to lose. If she does not gain by that deed, these last ought not to lose any part of the provisions conceived in their favour by the trust-deed. The heirs have no title to found upon the revocation. It was not intended to give them any claim against the parties favoured by that deed, far less to open the succession to them. It was intended merely to regulate matters between the widow and the legatees, and not to create any new interest in favour of the heirs-at-law.

If, therefore, the judgment in favour of Mrs. Whytlaw rests on the *intention* of the testator, the same ground must operate in favour of the legatees. The trust-deed contains positive evidence that the testator preferred the legatees to his heirs-at-law. And although by the Jamaica will he intended to prefer his widow to the residuary legatees, yet that intention being ineffectually executed, and the revocation being necessarily

controlled by the intention, so if the intention fail of effect, the revocation must fall just as much as in the case of Mrs. Whytlaw.

LAWG
v.
WHYTLAW.
1810.

The question of solemnities involved in the present case is of such great and general importance, that the Court will be glad of the opportunity of reconsidering it, for the purpose of settling, by an ultimate decision, all doubts that may hereafter arise with regard to the validity of revocations executed abroad, according to the *solemnia loci*. The objections taken to the will executed in Jamaica, founded upon the want of the statutory solemnities, ought to be sustained, and the trust-deed ought to be held a valid and effectual deed, in so far as the legatees can claim an interest under it.

PLEADED FOR THE HEIR-AT-LAW.—The widow and the legatees stand in very different situations. The residuary disponees under the trust-disposition take nothing under the will executed in Jamaica, and the legacies left to the special legatees are considerably reduced by the latter deed. The provision to the widow under the trust-deed was an enlargement of the provision stipulated in her contract of marriage. By the Jamaica deed, the intention of the testator was to enlarge, not to diminish the provision to his wife. But with regard to the residuary disponees and special legatees, the intention was to take away, or diminish, the interests conferred upon them by the trust-deed. The Court cannot, by the exercise of any equitable power inherent in it, give to these parties what the testator had clearly taken away from them.

ARGUMENT FOR
HEIR-AT-LAW.

At the first advising of the Reclaiming petition, the Court delayed pronouncing judgment. At the second advising, they “Adhered.”

JUDGMENT.
Feb. 20, 1810.
March 6, 1810.

LORD HERMAND observed,—“The widow got more by the second deed having the revocation, than she got by the first, and, therefore, the distinction drawn by the interlocutor right; but I do not think the legatees have the same principle to plead in their favour, for the legacies left to them by the revoking deed were smaller than those left them by the first deed; consequently their situation is altered for the worse.

OPINIONS.
Feb. 20, 1810.
MS. Notes.
Lord Succoth's
Session Papers.

“The general question involved in this case was decided by

LANG
v.
WHITLAW.
1810.

the case of Sir Thomas Dundas ; and I am not for going back upon it."

MS. Notes.
Lord Succoth's
Session Papers.

LORD ARMADALE observed,—“ My interlocutor sustains the revocation *in toto*, and the words are clear, and explicitly go this length. But by this interlocutor your Lordships have sustained the revocation in part only. I cannot take this view of the case. In construing settlements, I do not feel myself at liberty to look at the previous deeds, which are expressly revoked by this deed of revocation or will, which is declared to be the regulating deed. To do otherwise would be to make a will for the party.

“ As to the general point, I have no doubt that a deed executed regularly, according to the law of the place where it is made, will be an effectual deed of revocation, though it should not be an effectual settlement of the Scots estate. See many cases in which this has been held. Case of Sir Thomas Dundas, where this was held ; and indeed I see nothing wrong in point of principle in this.”

MS. Notes.
Lord Succoth's
Session Papers.

LORD PRESIDENT BLAIR observed,—“ The general question is, Whether this revocation, which has not the solemnities of the law of Scotland, is sufficient nevertheless as a revocation ? *First*, Must consider the circumstance, viz., that this deed is regular according to the *lex loci* in Jamaica. It is now clear law, that in making a deed to convey Scots estate, it must be formal according to the law of Scotland ; and I can see no difference between such a deed and a deed of revocation for altering a former deed. This is a most important point ; but if your Lordships think otherwise, I wish the judgment may be put on this, so as to save the still more important question, viz., Whether revocation executed in Scotland, must not be formal according to law of Scotland, if it is to affect heritage ? I see nothing in any of the Statutes which admits of this distinction. What is it that makes it necessary that the party should subscribe every writing of the kind, except these very Statutes ? Now, don't these very same Acts require the other solemnities ? The spirit of the Acts again is equally in favour of the principle to prevent the danger of forgery, which indeed is greater in the case of a deed of revocation than in almost any other. Our systematic writers again do not lay down nor hint at revocations as being

an exception from the general rule, and being one of the privileged writings. Do any of the Style writers mention this ; or does practice give any support to this idea ?

LANG
v.
WHYTLAW.
1810.

“ It is said that the point is settled ; but the case of Barclay v. Simpson did not decide this, for the writing was supposed to be holograph. As to the case of Sir Thomas Dundas, the decision of this Court certainly was contrary to my opinion upon the point, but it was left entire by the House of Lords. It is a solitary decision of this Court, which cannot bind us. I see that it was generally held by the great Judges who concurred in that decision, that one decision does not make law, although a train of decisions ought not to be departed from.”

Baron Hume’s Note of the last advising is as follows :—
“ Very little passed at deciding on these papers ; and that little was not satisfactory. The President said, that the Interlocutor as it stood settled nothing as to a deed of revocation executed in Scotland ; and that, if such a question were to occur, he would hold it as open, and consider it very maturely.”

OPINIONS.
March 6, 1810.
MS. Notes.
Baron Hume’s
Session Papers.

III.—LEITH v. LEITH.

In 1835, Sir George Leith, by a *mortis causa* settlement, conveyed his whole property, heritable and moveable, to trustees. The purposes of the trust were for payment of the residue to his sons, in certain proportions. The truster reserved to himself power to alter the deed in whole or in part, at any time of his life, and even upon deathbed.

June 6, 1848.
NARRATIVE.

In July 1841, the truster executed a holograph will altering the proportions of the residue destined to his sons in the trust-deed. In this deed he referred to the trust-deed in the following manner :—“ In a former will made in Edinburgh, now in the hands of James Arnott, Esq., W.S., I named him, Charles Forbes, Esq., my wife and sons, executors. I will that they be continued as such. Should there appear any informality in this my last will, in consequence of its not being witnessed, then the former will to be considered as my last will.”

LEITH
F.
LEITH.
1848.

In December 1841, the truster executed another will, purporting to be a settlement of his whole estate and effects whatsoever, and wheresoever, whether real or personal, specially including the houses and heritable bonds belonging to him in Scotland. This will was executed according to the formalities of the law of England. It contained a revocation of all former wills, in these terms: "I, Sir George Leith of Melville Street, Edinburgh, in North Britain, but now in a temporary residence at No. 16, Holles Street, Cavendish Square, in the county of Middlesex, Bart., hereby revoking all former and other wills, codicils, and testamentary dispositions by me at any time heretofore made, do declare this to be my last will." This will contained a nomination of trustees and executors, and bore to have been subscribed by the granter, and published by him as and for his last will and testament, in presence of two subscribing witnesses.

The testator died in January 1842, and his eldest son, Sir Alexander Wellesly Leith, died in the month of April following. The trustees under the deed of 1835 brought an action of constitution against the eldest son of Sir Alexander Wellesly Leith, setting forth, that as the trust-deed contained no procuratory of resignation, or precept of seisin, it became necessary to constitute the obligation contained therein against the defender as heir-at-law of the truster, and concluding that he should make up titles to the various heritages held by the truster, and should convey them to the trustees. The defence against this action was, that the trust-conveyance of 1835 was revoked by the English will of 1841.

ARGUMENT FOR
PURSUERS.

PLEADED FOR THE PURSUERS.—The trust-deed of 1835 was not competently revoked by the English will of 1841, for that will was not probative according to the solemnities required by the law of Scotland.

In principle there is no distinction between the conveyance of heritage and the revocation of a conveyance, which practically changes the destination of the heritable subject. Both equally affect the lands, and that not circuitously, as in the case of mere personal obligations, which may come to impose burdens on land by being followed by real diligence, but

directly and immediately. Both must take effect within the territory where the lands are situated—both must be construed on Scots principles of interpretation, and the meaning of the technical terms used must be ascertained by a reference to the practice and understanding of Scotland.

LEITH
v.
LEITH.
1848.

There is no doubt a difference in the terms used in the constitution of an heritable right and its revocation,—certain *verba solemnia*, or words of *de præsenti* alienation, being required in the first case, while any evidence of intention, proved in a competent manner, is sufficient in the latter. But beyond this, the distinction does not go. In both cases there must be a *probative deed*. And as in both cases the subject of the deed is Scots heritage, the deed must be probative according to the *lex rei sitæ*.

The power of revoking a conveyance of heritage already made, is simply the exercise of a reserved faculty in regard to lands. It does not differ from a faculty to burden with debt lands which have been given off by *de præsenti* conveyance to a third party. When a conveyance is granted by a deed *inter vivos*, it operates as a present conveyance to pass the property, and there are just two ways in which this legal effect is suspended, so as to preserve the granter's power over it, where he does not intend the conveyance to be absolute and irrevocable. He may retain the deed in his possession undelivered, so as to have the power of destroying or cancelling it *via facti* at any time before death; or he may reserve a power or faculty of revocation which will be effectual to him, and may be exercised by him at any time during his lifetime, even though the deed has been delivered—nay, although infestment should have followed upon it.

But such a faculty of revoking a conveyance of land, differs in no respect from any other faculty, which, in making the conveyance, the granter may have reserved to himself; such as the power of burdening the lands conveyed with certain provisions or sums of money, payable either to the granter or to some other party in whose favour he has stipulated for the exercise of the faculty. With regard to all such exercises of a reserved power connected with lands, the deed, bearing to be granted in the exercise of the faculty, must be probative according to the law of Scotland.

LEITH
v.
LEITH.
1848.

A deed made by the granter in England, in exercise of the reserved power, probative according to the law of England, but not according to the law of Scotland, cannot be regarded as an effectual exercise of the faculty reserved to the granter.

The plea that revocations are to be less formally dealt with, because a man may revoke without writing at all, by cancelling the deed, burning it, or directing another to do so ; and that therefore a less formal deed may be received in cases of revocation than of conveyance or burdening, cannot be sustained. If a party, having full control over his deed, cancels, or directs another to cancel it, this will no doubt be an effectual revocation. But if, instead of thus extinguishing it *via facti*, he adopts the plan of revoking by a *written deed*, he must be presumed to have intended that the writing should be authenticated by all the ordinary securities which the law of the country where the revocation is to operate requires in the case of written deeds.

But even if the English will of 1841 could be looked at at all, it cannot, according to its fair construction and import, be said to revoke the trust-conveyance. The words used in the English will do not reach, and were not intended to reach the trust-deed. They are all applicable only to proper wills, or mere testamentary deeds, and not to the *de presenti* conveyance of his heritage which the truster had granted. The trust-disposition was the basis of his settlement. Without that deed, the truster knew that a mere testamentary deed would be of no effect whatever. The English will was plainly intended to be taken along with the trust-deed, as explaining or modifying the purposes declared by that deed, but not as recalling it. The consequence of recalling it, the truster was well aware, was to leave him intestate as to his heritage, and thus to frustrate the whole purposes he had in view, by opening the whole succession to his heir-at-law.

ARGUMENT FOR
DEFENDER.

PLEADED FOR THE DEFENDER.—The will of 1841 was executed in England ; and, according to the law of England, it is valid and unexceptionable in point of form. The general principle of international law applicable to the form of writings is, that the law of the country where the party happens to be, the

lex loci actus, is to regulate in regard to the mere form and authentication of writings.

The Scots statutory forms do not apply, in general, to writings executed in a foreign country. There is one exception, however, to this general rule. Direct conveyances of heritage in Scotland must be probative by the law of Scotland, in order to be effectual. This exception, however, is confined to conveyances, and does not apply to testamentary declarations, or to mere revocations, which stand upon the simple will of the testator, and require nothing more than the authentic ascertainment of that will.

The Scots Statutes relative to probative writs apply, *first*, to all writs of importance executed in Scotland; and, *second*, to all direct conveyances of Scots marriage, whether executed in Scotland or not. All other writings, however, executed out of Scotland, however important, including contracts, wills, testaments, revocations, &c., are valid and effectual if executed according to the forms of the country—the *lex loci actus*.

The question as to the intention of the testator under the expression “wills,” to revoke the trust-deed of 1835, is free of all ambiguity. In the holograph deed of 1841, the testator himself designated the trust-deed as a “former will.” This is a fact of decisive importance in the present question. The contents of the English will of 1841 also lead to the same result. By that deed, the testator disposes of his whole property, heritable and moveable, exactly as if all his former settlements had been cancelled or thrown into the fire. The present case is, therefore, a stronger one than that of *Lawrie v. Lawrie*, July 12, 1843; for in that case, the deed importing a revocation did not make a new disposition of the residue of the testator’s fortune, but merely indicated his intention to make a new general settlement.

LORD CUNINGHAME, Ordinary, Reported the case to the Court. In a Note his Lordship observed,—“On general principles, it is apprehended that a formal valid conveyance of heritable rights and property in Scotland, cannot be discharged or recalled, if the granter intends to do so by writ, unless the document is executed with all the solemnities of the original title. The general maxim of law admits of few exceptions,

LEITH
v.
LEITH.
1848.

Note of Lord
Ordinary.

LEITH
v.
LEITH.
1848.

' *Unumquodque dissolvitur in eodem modo, in quo colligatur,*' and the Act 1681 expressly provides that all deeds of importance shall be executed according to the manner therein prescribed, and declares all deeds otherwise executed void and null. It cannot be laid down in the abstract, that a deed discharging a prior title, executed according to all the formalities of the law, is not a deed of importance, under the Statute. Neither is there any authority as yet in our law to sanction improbable revocations of prior valid conveyances of landed estates.

"In the next place, the same plea is urged by the trustees here, which was successful in the cases of Dundas, of Henderson, and of Whytlaw,—that the revocation in the present instance, even if it had been unexceptionable in point of execution, was not really intended by the grantor to apply to the trust-deed in favour of the pursuers. That conveyance was a useful title vested in the trustees, not for their own behoof, but to enable them to carry into effect, not only the division or appropriation of the truster's property made in that deed, but every other arrangement or disposition of his estate, which he might appoint by the deed under his hand at any time of his life; and in cases of this description the law has ever shown the greatest reluctance to hold such a deed recalled by a posterior will, unless that has been done by words, as in the Crawfordland case, bearing distinct special reference to the instrument thus annulled."

June 30, 1846. The Court, after hearing counsel, Appointed new Cases to be prepared on the whole cause, and to be laid before the whole other Judges, who were requested to state their opinions in writing upon the points therein discussed.

OPINIONS.
Lord Justice-
Clerk Hope.

In the Opinion returned by LORD JUSTICE-CLERK HOPE, his Lordship observed,—“I am of opinion that Sir George Leith did intend and purpose, taking the latter deed or will to declare his purpose, by that will of December 2, 1841, to revoke his general settlement of December 11, 1835, and did express that purpose.

“I say taking that will to declare his purpose; for I apprehend this discussion must proceed entirely on the evidence and

declaration of intention and purpose contained in and set forth by the will. I cannot at all take any general conjecture as to the probable views of Sir George Leith, if the question had been put to him. The point before us is not what Sir George Leith would have decided to do, if the nature of the trust-deed had been explained to him in London—if he had been told that an English will could not convey Scots heritage—that he might revoke and alter all the purposes, or so many of the purposes of the trust-deed ; but that it would be useful to keep up and maintain the general conveyance of the heritable and other property by the Scots trust-deed for the very purpose of effectuating any later purposes he might express. No such view of the matter is admissible ; and all speculations, perhaps too much introduced into one or two of the cases referred to, as to the objects and views of the party, are, I think, to be excluded, if not evidenced by, or properly collected from his own deed and writing. I take this question, although one of intention and purpose, to be determined exclusively by the writings under consideration.

LEITH
v.
LEITH.
1848.

“ The next point is perfectly distinct and separate. Holding the revocation in the English will to be express and universal—clearly comprehending within its terms the trust-deed of December 11, 1835, so as to be a revocation of that deed, is the latter still to have effect on the ground that the English will is a writing incapable of revoking this *mortis causa* deed, so far as regards the disposition of heritage thereby made ?

“ The law of Scotland, *ex concessis*, does not require the deed of revocation to be a deed executed under its own forms, *because* it must be capable of conveying the landed property ; and hence it must always be attended to that the rule of the *lex loci rei sitæ* does not apply in the ordinary way and understood object of that rule. The Scots law sustains, as an effectual revocation, any explicit writing, provided it is executed, it is said, in Scotland, although not capable of conveying or affecting, directly or indirectly, the land situate in Scotland. Then, on what ground is it that the plea is rested that the revocation is not effectual, if not *executed* with the solemnities established by the law of Scotland for deeds which are executed in Scotland ?

“ Perhaps, full as the notes are by one reporter of Lord Pre-

LEITH
v.
LEITH.
1848.

sident Blair's opinion, delivered in *Lang v. Whytlaw*, they can hardly be taken as sufficient to ascertain the exact doctrine he held—a point which it would be of great interest to know with accuracy. So far as these notes can be relied on, they seem certainly to show that the *lex loci rei sitæ* was the doctrine which, at times, he applied to the case ; yet, in other passages, he seems to go upon the direction in the Statute as to writs of importance, which is entirely a different and separate ground, and equally applicable in a great variety of cases to which the principle as to the *lex loci rei sitæ* could never be applied. The main view seemingly stated by President Blair was this, namely, that the revocation at least indirectly affected land by altering another deed, and so letting in the heir-at-law ; or it might be by the mere act of revocation restoring another deed. That view apparently rests on the *lex loci*. But then these results are effected by deeds not capable of conveying land, provided, the pursuers say, the deed is only tested in the Scots form—a consequence seemingly quite inconsistent with the general doctrine ascribed to President Blair, if we can correctly apprehend it from the notes.

“ Further, *indirect* results as to land, nay, many results *positive* in their consequences, although through the medium of legal proceedings, may follow, from obligations granted according to the forms of another country. Hence it is not sufficient to say, that the revocation must be ineffectual if not *executed* according to the formalities required by the law of Scotland, because indirectly and in its results the *right to land* may be affected. Erskine, and all the authorities founded on similar decisions, specially instance *obligations to convey*, which, if executed *lege domicilii*, will be effectual ; yet these may be said to *affect* land not in a very indirect way, and are writs of importance.

“ Looking to the matter on principle, it does not seem that the point is one to cause so much difficulty. *First*, There is surely a great distinction between a writing conveying or directly affecting land, and one disallowing the right to claim, or the hope of succession to, land created by another deed.

“ That distinction the law of Scotland fully adopts ; for a revocation in a form wholly insufficient to convey is yet effectual, as we have seen, and is admitted, to regulate, in one sense,

the right to land, or, in other words, to exclude the claim and hope of succession thereto—whether by letting in the heir-at-law, or by restoring another prior deed not fully and unconditionally revoked. Then, why should not an express declaration of the granter's purpose, by which he revokes a prior deed, when fully proved to be his act and deed, be sufficient to bar his own disponent from founding on his prior deed, if that declaration is regularly authenticated by the law of the country where he resides? The very distinction above noticed in the law of Scotland admits the wide difference between a deed of conveyance and a revocation, and seems fatal to the attempt to extend in such a way the rules for the execution of deeds in Scotland.

“*Second*, There is surely a fundamental distinction as to a man's right to convey or burden *land*, and over his own undelivered *mortis causa* deeds, whether by total or partial revocation. As to the former, the interests of the community require that certain forms alone shall be allowed to transfer part of the territory of the country, so that the rights thereto shall be of a certain character and style. But a man's own deed is his own property—the proper subject of his own decision and will. ‘Any evidence of his intention, proved in a competent manner, is sufficient’ for revocation, as the pursuers state in the passage already quoted.

“Then why should the proof of such intention be limited to the solemnities required for deeds *lege loci rei sitæ*, when words capable of and necessary for conveying land, are not required? To say the deed is of importance would exclude a great variety of contracts entered into by Scotsmen, which are beyond all doubt the foundation for direct proceedings affecting land.

“It seems to me that the plea of the pursuer is an attempt, similar to several in the course of the last century, which the decisions of the House of Lords corrected, to apply the rules of the law of Scotland in a way beyond their proper object, and inconsistent with those personal rights which every man carries with him into whatever country he removes, and to which our law ought not to deny effect. One of the most important and leading of these *personal* rights is the power to dispose of his own deeds in any way the granter chooses. He executes deeds wholly revocable—which subsist only through his will and plea-

LEITH
v.
LEITH.
1848.

LEITH
v.
LEITH.
1848.

sure ; which, if not expressive of his will, are powerless—and which ought to receive effect only because it is his will that they should receive effect.

“ I am quite satisfied that the doctrine of the pursuers will not receive support, if we attentively sift the grounds on which the doctrine really rests—for it does not rest consistently on any one distinct ground.”

OPINIONS.
Lord Cock-
burn.

In the Opinion returned by LORD COCKBURN, his Lordship observed,—“ The instrument of 2d December 1841 sets out by an express revocation of ‘ all former and other wills, codicils, and testamentary dispositions by me at any time heretofore made ;’ and it adds, ‘ I do declare this to be my last will.’ It then goes on to make a new settlement of the whole estate.

“ Construing this instrument according to the rules and ideas of the law of Scotland, it seems to me that in its language it clearly recalls its predecessor of the 11th of December 1835. Not only are all previous wills and testamentary dispositions revoked expressly, but, as I interpret the last writing, it plainly implies a revocation of the trust-deed, because it amounts to a new and independent arrangement of the whole affairs. The two deeds could not both receive effect. Supposing the general words of revocation to be out of the way, no practical extrication of the details of the second deed could produce the same results as would follow from the first. Revocation, at least to a certain extent, is implied in this single fact. But there is no need of having recourse to implication, for there is a revocation that is direct and express ; just as much as if the revoked deed had been distinctly named. The first deed was never his, except conditionally ; the condition being that he did not revoke it ; and he has revoked it.

“ The other question, besides being decisive of this cause, is of great and general importance to the law. It is, whether a power of revocation, reserved in a Scots trust-deed conveying real and personal property, can be effectually exercised by a foreign instrument, which, though not probative by the law of Scotland, clearly expresses the intention to revoke, and is, in its forms and terms, effectual according to the law of the place where it was executed, and where the granter happened to be at the time ? I think that it can. And I do not feel that more

is necessary, in support of this opinion, than the consideration, that the exercise of such a power of revocation, being purely a personal matter, may be proved according to the law of the place where the act is performed.

LEITH
v.
LEITH.
1848.

“ There are occasions on which mere will will not operate, or rather will not be held to exist, unless it be proved in a particular way. A ship is not transferred, nor an estate conveyed, nor a real burden created, by a mere expression, however grammatically clear, of a will by the proper party that these things are to be. But there are other occasions on which nothing beyond an expression of will is required—as in conferring a legacy. Revocation, under the exercise of a reserved power, belongs to this last class. The intention to revoke must, verbally, be clear ; and the fact of the party having had this intention, must be proved. But there is no technical phraseology necessary for the expression, nor is there any prescribed species or form of evidence by which, alone and universally, the fact of its existence in the mind of the party must be established.

“ The present case is not within the words of the enactments of the Scots Statutes ; and still less is it within their principle. These regulations plainly all apply only to writings executed in Scotland. There was not a peer, churchman, or burgher, in these feudal parliaments, who was bestowing a thought upon the effect to be given, *comitate gentium*, to any foreign writings. They were legislating for Scotland alone, and were not attempting to constitute an universal *vade mecum* for all the lieges of Scotland wherever they might go. It is no part of these statutory rules, that even when the writing is executed beyond Scotland, it must still be in the Scots form. A testament is a writing of importance. Can it not be executed by a Frenchman, or by a Scotsman living in France, and with a view to Scots results, according to the forms of the law of France ? I cannot believe that whenever a Scotsman goes abroad he must travel, if he should require to execute a personal deed, not directly involving heritable title, under the burden of his native Acts passed in the years 1578 and 1579.

“ It has been argued that a conveyance of real property in Scotland cannot be destroyed, except by a deed as thoroughly Scots as the conveyance itself ; and this is the defender’s lead-

LEITH
v.
LEITH.
1848.

ing plea. If the trust-deed had conveyed no real property in Scotland, I do not understand their objection to arise. It is all founded on the difficulty, or rather the mystery, that is supposed to attach to the attempt to extinguish a Scots real conveyance by a deed less Scots than the deed of conveyance itself. But this plainly depends on the way in which the extinction is attempted to be effected. If it is effected by a new conveyance, of course the new one requires to be as technical and local as the old one. Being made a matter of real title, the rules of the law of Scotland applicable to real title must be observed. But it need not necessarily be done in this way. The granter may impose upon his deed the condition of revocability at his discretion; and this discretion may be exercised without any new conveyance; or, what is much stronger, it may be effectual, although an intended and attempted new conveyance should fail.

“A revocable conveyance may surely be defeated by a mere revocation. And if this be true, the revoking writing may be liberated from the rules of authentication applicable to conveyances, in so far as it revokes. The pursuers say, ‘*unumquodque dissolvitur in eodem modo in quo colligatur*,’—an obligation must be dissolved in the same way it is contracted. But this maxim extends no farther than this,—that writing alone will cut down writing. It does not mean that the two writings must always be identical in their forms. A holograph will may recall a legacy constituted by a regular testamentary deed. The rule, as applied by the pursuers, would lead to this general result, that no Scots instrument, though only concerning personal rights, or personal property, could ever be affected by any foreign instrument, unless this instrument happened to square exactly with the law of Scotland in its forms. We have writing here to extinguish writing—a written revocation to recall a trust-deed. The question is only, whether the writing be sufficient?”

OPINIONS.
Lord Moncreiff.

In the Opinion returned by LORD MONCREIFF, his Lordship observed,—“The question to be determined is, Whether, looking to the whole structure and the whole provisions of this deed, it must be held, that, by the general words at the beginning of it, the original trust-deed has been revoked?”

"I am sensible that there is great difficulty in this question. But on the best attention which I can give to it, and to the authorities on which it must depend, I am of opinion, that it ought not to be held that this deed is effectual to revoke the trust-deed.

LEITH
v.
LEITH.
1848.

"I cannot accede to the proposition, that, in this question, there is any difference between deeds for revoking heritable titles or conveyances previously constituted, and any other deeds affecting heritable titles. At the same time, when we come to the matter of the particular deed here in question, I think that the case of such a complex deed, consisting partly of revocation by general words, and partly of an attempt to convey heritage incompetently, is essentially different from that of a simple deed revoking expressly and specifically a particular deed previously executed,—as, for example, if this English deed had simply revoked in express words the special trust-deed executed on the 11th December 1835, and had attempted no more. The latter is not the case to be resolved ; and I think it very necessary to keep the difference steadily in view.

"The main plea for the efficacy of this as a deed of revocation is, that the testator being in England for the time, executed it according to the forms of the law of England. It is granted, that he could not make an effectual settlement or conveyance, by the forms of that law, of heritage situated in Scotland ; because it is and must be granted, that real estate can only be conveyed by the law of the place where the property is situated. If there be any proposition clear, this is clear. It is indeed so elementary, that it is hardly worth while to quote authority for it. But the principle is so clearly expressed by Lord Kames and by Mr. Erskine, that it may be useful to keep it clearly before us, in the comprehensive terms which they have employed. Lord Kames says, 'Every legal act concerning land, the conveying it *inter vivos*, the transmitting it from the dead to the living, the security granted on it for debt, are ascertained by the municipal law of every country, and with respect to every particular of that kind, our Courts are tied down to their own law.' Mr. Erskine, in treating of the subject, observes,—'In the conveyance of an immovable subject, or of any right affecting heritage, the granter must follow the

LEITH
v.
LEITH.
1848.

solemnities established by the law, not of the country where he signs the deed, but of the state in which the heritage lies, and from which it is impossible to remove it.'

"In these passages, the authors do not at all limit the principle to deeds of direct conveyance of land. It is 'Every legal act concerning land,'—'Any right affecting heritage,' that the rule embraces. But it would surely require very clear and positive authority to warrant the Court holding, that, though a conveyance of heritage could not be so made, a revocation or extinction of a conveyance already executed may be effected in such a manner. I humbly think, after examining all the cases which have occurred, that there is no authority sufficient to establish such a distinction."

After reviewing all the cases bearing on the question, LORD MONCREIFF continues,—“On a review of all the cases, it appears to me, that there is yet no authority for holding, that a trust-deed for the conveyance of heritage duly executed according to the law of Scotland, can be revoked by general terms of revocation expressed in a last will and testament, not probative by the law of Scotland, and only executed in the form of an English will; and that there is a great deal of very ruling authority against that proposition. Carrying this point along with us, we may now look at the question of intention in the last will before us.

“If we look to the substance of the thing which was intended to be done by the instrumentality of the last will, it is manifest that, when Sir George Leith contemplated the making of certain special provisions, he had it more particularly in his mind to carry into effect the precise manner and proportion of the distribution of the residue of his estate, which he had before laid down in his holograph will, differing from that in the trust-deed; and as to the sufficiency of which, in point of form, he had expressed doubts. But if this was his intention, and if he meant to comprehend in this manner the disposal of all the heritable property which was covered by the trust-deed; on what ground can we hold, that he intended to revoke that trust-deed, without which subsisting, his intentions could not receive effect?

“If the deed is neither sufficient in form, nor in the general

words employed, to revoke such a trust-deed, and if there is nothing else in the will, from which such an intention can be deduced, how can we infer that it really existed? There is no express revocation of the trust-deed, as in *Whytlaw*; and I think that it is rather to be implied, that Sir George knew very well that by the law under which he had lived, and that of the place where his real estate was situated, where also his legal domicile still was, such property could only be conveyed by a regular disposition in conformity to that law, and that it was only by the force of the trust-deed which he had previously executed, that his present intentions with regard to that property could be carried into effect. He had left that trust-deed in the hands of his man of business in Scotland, by whom it had been prepared. He had given no directions whatever for cancelling it, nor ever said a word implying that he wished it to be recalled. On the contrary, when he wrote his holograph will in Scotland, changing the actual disposal of his funds, he distinctly indicated, that if that should fail for want of form, the disposal already provided by the trust-deed should take effect. Can it, then, be legitimately inferred, from general words in a deed, which by itself was altogether unfit for accomplishing its purpose, and from terms of revocation not directly applicable to such a trust-deed, that it was in his intention to put an end to that deed, and actually to destroy the machinery which he had provided for enabling him to effect his object? I can find nothing whatever in this deed indicative of such an intention, if it is not to be found in the general words of revocation themselves—which words are the same with, or exactly similar to, the words which have occurred in many of the cases in which it has been found that the previous deed was not revoked.

LEITH
v.
LEITH.
1848.

“I consider the case as a case of importance. It is important to some of the family of the deceased, and I think it of importance to the law. The testator’s intention in the whole matter is too clear to admit of any doubt. The question is, Whether that intention is defeated by forms of law? And I am of opinion, that in sound construction of the things done, with reference to the law declared in former cases, it is not defeated. I am of opinion,—*First*, That the trust-deed could

LEITH
v.
LEITH.
1848.

not be legally revoked in the form and by the terms adopted ; and *Second*, That there is no sufficient evidence that the testator intended to revoke it, and that every reasonable presumption is against the existence of such an intention."

OPINIONS.
Lord Ivory.

In the Opinion returned by LORD IVORY, his Lordship observed,—“I am of opinion, that the English deed of 2d December 1841 has not revoked the prior Scots trust-disposition and settlement of 11th December 1835. I do not, however, arrive at this conclusion by holding that such a revocation might not have been habilely effected by a deed, otherwise sufficient, executed in the English form. For, on the general and abstract question, I agree with those of my brethren who are of opinion that an instrument, such as the trust-deed 1835, and standing in the same circumstances, might competently have been revoked by any deed to that effect, duly executed according to the technical formalities required by the *lex loci actus*.

“The deed alleged to have been revoked was, to all intents, an undelivered instrument. It had never taken effect in the persons of its grantees. No vested or existing interest had thereby been conferred upon any one. It had not, directly or indirectly, entered into the progress of titles by which the granter possessed, and down to the moment of his death continued to possess, his Scots heritage. It remained entirely in the hands, and under the absolute and unqualified control of the granter. And until he chose, either to complete it by an act of delivery during his life, or to leave it a subsisting and operative deed at his death, it did not of itself, in the most remote degree, affect his heritage, or, whether in the statutory sense or otherwise, ‘import heritable title.’

“It is in this point of view, and with reference to the trust-deed of 1835, as an undelivered, and therefore so far uncompleted and imperfect conveyance, that I am disposed to hold a revocation, duly executed *secundum legem loci actus*, to be sufficient for its recall. For, under such circumstances, nothing more seems to be requisite than an effective declaration of the granter’s will, that that act of delivery on his part, which is still indispensable to its operative character as a conveyance, shall not, now or hereafter, be adhibited, so as to give it its

legal and necessary completion. He revokes it, in like manner as he might have cancelled it, or thrown it into the fire—not to destroy or affect any right which it had hitherto conferred, but simply to remove out of the way what in itself is no more than an inchoate, but not yet definitive expression of purpose—and as such, therefore, still subject to be retracted and controlled by a countervailing expression of intent. So considered, the revocation plainly neither ‘imports heritable title’ in itself, nor affects any right which has ever, in any sound legal sense, subsisted as an ‘heritable title.’

LEITH
v.
LEITH.
1848.

“No doubt such a revocation must be probative of the intent and purpose to revoke, which is necessary for its efficacy. But it is in this sense probative, when executed with the formalities which would be held sufficient in any other case dependent upon the expression of the party’s own mere will and pleasure. If executed in Scotland, of course it must be executed with such solemnities as the law of that country requires. If abroad, it will be enough that the *lex loci actus* be satisfied. A revocation executed in England, so as to be probative of the party’s will and intent there, will consequently be no less probative here. The *lex rei sitæ* does not come into play; for what is to be dealt with, is neither the *res sita* of the party’s heritage, nor any existing title of that *res sita*, but the mere expression of will in a written instrument, the efficacy of which remains as yet dependent upon the party’s own continuing purpose, and from which all active operation and effect is therefore taken away, the moment the party makes it evident that his purpose in this direction is changed. It is presumed, that were such a party in England merely to execute a power of attorney, probative by the English law, and directing the cancellation of the undelivered instrument, this of itself would be sufficient warrant for its destruction, though the solemnities of the Scots law had been in nowise followed in the matter.

“The conclusion thus arrived at seems in accordance with the authorities. For Lang and Whytlaw’s case was only the last of a series in which the point had been expressly decided by our own Courts. It is very true that some of these judgments were reversed upon appeal. But not one of them was reversed upon grounds which touch this question; so that, in

LEITH
v.
LEITH.
1848.

point of Scots authority at least, there is a *series rerum judicatarum* standing nearly together for a century, without one single contradictory instance, and necessarily regulating the practice of the country for all that length of time ;—Whytlaw's case bringing up the rear with a solemn judgment, pronounced by a large and preponderating majority of the Court, after full discussion and consideration of the effect of the supposed reversals.

"I may only add on this head, that as to the case of *Barclay v. Simpson*, it appears distinctly, from a second litigation to which it gave rise, and the report of which, *Montgomery v. Foulis*, seems singularly enough to have been overlooked by the present parties, that neither the will nor codicil on which the question there turned was, in point of fact, holograph. If, therefore, in the original litigation, any misapprehension or error was fallen into on this subject, I should be more apt to conclude, that it was because both the Court and parties held the fact unimportant, than that, with a revocation distinctly before them, only executed in the English form, either would allow so severely contested a question to proceed to final judgment, without taking the trouble to inquire into a point, in that view of the case absolutely vital.

"Of a like bearing in principle, I hold the whole class of decisions from *Auchterlony* downwards, which have settled the competency of executing deeds of instruction according to the forms of the *lex loci actus*, when necessary towards carrying out, or, it may be, controlling, and even altering in its substance, a previous conveyance of Scots heritage, intended to be carried into execution through the medium of trustees. In the present case, for example, had the deed 1835, instead of reserving a power generally to revoke and alter, embodied the usual clause, directing the trustees to execute the purposes of that deed, or any others which the granter might thereafter declare by another deed, it will not be disputed that this latter deed would have been perfectly effectual, though otherwise executed under the same circumstances, and with only the same English formalities, as the revocation now in dispute.

"But why should this have been? The original trust-purposes might have been in favour of an entirely different set of

beneficiaries from those in the subsequent deed of instructions, and the interests formerly conferred upon them in the estate conveyed, thus entirely destroyed. If so, what was the latter deed but a substantial revocation? But for it—just as is here argued in the case of a proper revocation—the estate would have followed its intended destination, as set forth in the original deed. Therefore, if the one form of deed could be held to ‘import heritable title,’ why not equally the other?—and why should the Scots solemnities, if necessary to validate either, not be so equally in regard to both? There seems no reason, in point of principle, for dispensing with the Scots solemnities in a deed of instructions, but that which I have ventured to apply in the present question, viz.—that so long as by the first deed there is conferred no proper *jus quæsitum*,—no definitive or operative right or title,—nothing more is required towards the validity of the second, than a probative expression of the party’s purpose; and, if so, a deed embodying this purpose, and probative by the *lex loci*, is sufficient.

“Holding, therefore, that—at least as regards a previous undelivered deed—a revocation duly executed according to the formalities of the *lex loci actus*, would be habile and effectual to operate its recall, or rather, I should more properly say, to intercept its completion, and prevent its ever coming into active existence as a delivered instrument at all,—my opinion that there has been no effectual revocation here, comes to rest upon a totally different, and, it may be thought, somewhat narrow ground.

“If the deed 1841 had been confined to a simple act of revocation, and had embodied, and been intended to embody, nothing else, I should, on the principle just explained, have held it quite sufficient for its purpose. Even if the purpose of revocation embodied in it had stood out—apart from its other purposes—absolute in itself, and clearly intended to take effect whether these purposes could also be carried into execution or not, I should equally have arrived at the same conclusion. And I should have done so in both cases, because, as an act and evidence of the granter’s will, the deed—*quoad* the *animus revocandi*—would have been complete, and with reference to every possible event, perfect and indisputable.

LEITH
v.
LEITH.
1848.

LEITH
C.
LEITH.
1848.

“But such is not the frame of the deed in question ;—and looking to its whole contents, I am not satisfied that the intent to revoke declared in it can be separated, or that, in the mind of the granter, it was separated from the rest of the deed.

“On the contrary, it appears to me, that that deed does not, in this sense, embody two distinct and separate acts of the granter’s will,—one, to revoke the prior deed, whatever should become of the remaining, and, as it would seem, the primary purposes to which the second had reference ; and the other, to carry out those purposes, irrespective, and without the aid of the accompanying revocation ; but rather, that it embodies, and was meant to embody, one composite act of the granter’s will, to which both portions of the deed were alike directed, namely, the purpose of making a new conveyance, towards which the revocation was to prepare and pave the way.

“In this view, I am of opinion that the deed, as a true expression of its granter’s mind, must be read as a whole ; and, therefore, that unless it shall stand good, and be able to subsist in this its integrity, it cannot receive effect as an evidence of full, entire, and completed purpose at all.”

OPINIONS.
Lord Medwyn,
Lord Cunning-
hame, Lord
Murray, Lord
Wood, Lord
Robertson.

LORD MEDWYN, LORD CUNNINGHAME, and LORD MURRAY, returned opinions in favour of the pursuer, both on the question of competency and on the question of intention. LORD WOOD and LORD ROBERTSON concurred in the opinion of LORD JUSTICE-CLERK HOPE.

OPINIONS.
Lord President
Boyle.

At the advising, LORD PRESIDENT BOYLE observed,—“When the case was originally brought before us by the report of the Lord Ordinary in the first set of cases, I stated that it appeared to me, while further discussion was deemed necessary, to be most desirable that the whole series of decisions applicable to this department of our law should be thoroughly sifted and examined, in order that we might distinctly see what had been authoritatively determined in regard to the questions submitted for decision. In addition to the able arguments by the Bar, I find that that task has accordingly been performed, in a manner very satisfactory to my mind, by Lord Moncreiff, in that part of his opinion which is devoted to the consideration of the various cases that have been referred to on both sides, and which, in fact, leaves very little more to be said in regard to any of them.

“ From that examination I hold it as fully established, that there is in reality no case that can thoroughly be relied upon as having directly decided, that a deed, with regard to the settlement and transmission of heritable property in Scotland, duly executed in terms of law, can be effectually revoked by an English will entirely destitute of all the legal solemnities of our law ; and, moreover, I am satisfied that there are decisions, both here and in the House of Lords, when duly weighed, which establish that the contrary must be held to be the law of Scotland. Further, I am free to confess that I am very glad to find that such is the true state of our law, considering the great risks to which heritable property may be exposed, by giving effect to revocation contained merely in instruments altogether destitute of those safeguards that have been deemed wanting for its security and preservation for the rightful heirs.

LEITH
v.
LEITH.
1848.

“ On considering the review of the other decisions that are noticed by Lord Moncreiff, I have only to say, that I have seen no reason to differ from what he has observed upon them ; and, without adding more, I must repeat my concurrence with the minority of the consulted Judges ; and I am, therefore, for decerning in conformity with their opinions on the general question, and with Lord Ivory on the point of intention.”

LORD MACKENZIE observed,—“ I agree with Lords Moncreiff, Lord Mackenzie, Cunninghame, Murray, and Medwyn, that the revocation is not valid, for want of due authentication. There are two points in that question. *First*, Can the revocation of a deed, in itself formal and completed, though revocable, conveying heritage in Scotland, be made there, in Scotland, except in the probative form of a Scots written instrument ? I think not, because it is a deed affecting heritage, in which probative writing is expressly required by our Statutes. I may refer to the Opinions of Lord Moncreiff and others on this point, which I adopt. I think the question is still open ; and then, I think, the reasons against sustaining an improbate revocation are conclusive.

“ It is said such purpose of revocation may be effected by burning or otherwise destroying the deed, without formal constitution of evidence. But 1. this affords no true analogy at all—*vitiosa transitio de genere in genus*.—See Opinion of Lord Moncreiff. 2. This must prove too much. Destroying a

LEITH
v.
LEITH.
1848.

deed needs no witness or evidence at all ; it may be done in a solitary closet, or by an oral order to burn a sealed packet, contents unknown, or deed unread, or given to one witness. Can a revocation, then, be made so in solitude, or by parole, to one witness ? This analogy is utterly fallacious, and affords not an atom of light on the subject of revocation of a deed, not destroyed, but left in existence, and in itself a formal, valid, written, operative instrument of heritable right.

“ The security to be provided, and the dangers to be guarded against, in regard to the destruction of deeds, are radically and wholly different from those in the case of revocation. Undue destruction of deeds can be done only by the few who have opportunity,—by possession of the deed. It is prevented or remedied by putting the deed in safe custody, public or private—by registration—by multiplication of copies—by proving of the tenor. It can hardly take place with effect after the deed has once been in operation. Undue revocation can be prevented by no other means than by requiring sufficient authentication of the instruments of revocation, which may be forged by any body, if made of too facile execution ; and it may be done after the deed is in operation, as well as before. The two things, therefore, have no resemblance or analogy whatever ; and it is mere fallacy to attempt arguing from one to the other.

“ It is said that a revocation is not a conveyance. I do not see the relevancy of that if it were true. Whatever it be called, a revocation of the nature here considered is a deed of importance affecting heritable right. But I think it is a conveyance. It takes away heritable right from a person who, abstracting from it, has that right ; and it of course gives that right to a person who, except by it, has not that right. I cannot see why such a deed should be called not a conveyance. Put the case that a settlement of land is made in favour of A—that then contradictory settlements are made in favour of B, of C, of D, and others—that then a deed of revocation is made of all the settlements posterior to that on A—Is that not a conveyance, a valid part of A’s heritable title ? The case is not materially different if A be supposed to be the heir-at-law.

“ I see, in the Opinion of Lord Ivory, a distinction attempted,

which is, I think, new in this case—viz., between revocations of deeds that have been in operation before the revocation, and deeds that have not been in operation. The former, he thinks, may be invalid if not in form of a probative instrument ; the latter, he thinks, must be valid in any form—which must mean, if proved, *de facto*, i.e., by preponderant evidence—to a Jury, or to the Court. That would be an exception of very little value to Scots conveyancing. For deeds that are revocable, and are put into actual operation before the power of revoking is ended by the death of a granter, are very rare. All our most valuable revocable deeds are put into operation only by being left in the granter's repositories at his death—after which, of course, he cannot revoke. The objections, therefore, to the admission of improbativ revocation in Scots conveyancing would remain the same, and of very nearly the same extent of importance, notwithstanding this distinction.

“ But further, what is the ground for it ? I see none. I see no such distinction in any Statute, decision, or law writer ; and I as little see any solid reason for it.

“ The second question is, Whether such a revocation, executed abroad, does, or does not, require that form ? On this I may refer to the Opinions of Lords Moncreiff, Murray, and Medwyn. But in truth it is admitted that, in general, deeds conveying or affecting land or immovable rights in Scotland must be in Scots form. And then, if it be successfully shown that deeds of revocation of Scots instruments of conveyance of land, or immovables in Scotland, do not differ, when executed in Scotland, from other deeds affecting Scots land or immovables, it seems to be just equally clear that they can as little differ when executed in other countries. The same jealous regard to the rights of immovable property, which requires the national authentication of other instruments affecting land, requires also the like authentication of revocations affecting it. I cannot imagine any thing like a sound reason for a distinction in this respect.

“ And here, again, see the consequences of admitting any other rule. Are Scots settlements of heritage to be affected by all acts or deeds of revocation, appearing to be proved by what is competent evidence in any foreign country where the granter

LEITH
v.
LEITH.
1848.

LEITH
v.
LEITH.
1848.

has been, or can be, by parole evidence shown, truly or falsely, to have been? and competent, too, not to prove the conveyance of land in these foreign countries—for that falls under special rules applicable only to itself there—but evidence applicable there to moveable rights? The danger of this is manifest. A single foreign witness, or a scrap of paper from abroad, might do away the right to the greatest estate in Scotland.

“I am therefore of opinion, that revocation of Scots deeds, conveying Scots heritable property, cannot be validly executed in foreign countries any more than in Scotland, except with the legal authentication of Scots law.”

Lord Fullerton. LORD FULLERTON observed,—“The present case is that of a deed undelivered; and consequently, in my opinion, creating no real right, which requires a deed probative by the law of Scotland to retract or extinguish it. In addition to the other answers to the principle urged on the other side,—‘*Unumquodque, eo genere dissolvitur, quo ligatum est*,’ there is the conclusive one, that by an undelivered deed of settlement, *nil ligatum*. There is no right created, no obligation constituted, which is not solely and exclusively dependent on the mere will of the granter, and his continuance in the same intention which dictated it. Any expression of will recalling that intention extinguishes the deed.

“And in reference to this, the competency of the extinction of the deed by cancellation or absolute destruction, is by no means irrelevant. How comes it that the granter has that power? It is not the law of Scotland that a party can validly extinguish any existing right by the mere corporeal destruction of the document by which it is vouched. On the contrary, such documents may be set up by a particular process, that of ‘proving of the tenor.’ The competency, then, of effectually extinguishing an undelivered deed by cancellation or destruction, evidently rests on the principle, that there is no right created by the deed while so undelivered, and that until delivered, it is a mere piece of paper or parchment, which he may deal with as he pleases.

“And this I consider to be the sound view of the case. While the deed is retained by the party himself, it confers no right of any kind—it is the evidence of no right of any kind. It has

no existence of any kind except in relation to the party himself ; and, in regard to him, whatever be its contents, it is nothing but a scrap of writing, which is just as much part of his moveable property, as if the paper or parchment had never been written upon. If this be so, why should he not have the power of dealing with it by a will, or by any writing vouching his intention, attested of course according to the law of the country where he happens to be at the time ? Why should he not have the power of authorizing a mandatory to do what he could confessedly do himself—destroy it by cancellation, or throwing it into the fire ? and, in such a case, would not the validity of the mandate depend on the conformity of it to the law of the country where it was granted, independently altogether of the contents of the deed to be destroyed ?

LEITH
v.
LEITH.
1848.

“ It appears to me, that the same principle applies to the recall of an undelivered disposition by a latter will. That will is only an expression of the disponent’s intention as to the disposal of a certain paper or parchment in his repositories. By revoking it, he merely excludes any inference of intention which might be drawn from the fact of its being left extant. He in truth declares that it shall not be delivered—a direction which is just as much within his power in regard to such a writing, as in regard to any other paper in his possession. My view is, that in the case of an undelivered disposition of heritage of Scotland, the question is not whether the revocation is so attested as to affect lands, but whether it is so attested as to affect the previous writing—a document clearly within the disponent’s power, and at his discretion.

“ In these circumstances, I cannot help thinking, that, though of course when the deed is not in his hands, a written expression of his intention may be necessary, still the validity or effect of such written expression of intention will depend on the validity of the writing of recall as expressive of intention, and not on the contents of the deed, which is the subject of revocation ; and that consequently the revocation will be valid, if the revoking deed is good as an expression of will, by the forms and rules of the country where it was executed.

“ On this first point, then, if taken separately, I should be disposed to do what was done in the case of *Lang v. Whytlaw*

LEITH
v.
LEITH.
1848.

—repel the objections to the revocation contained in the English will of 1841, in so far as they are founded on the want of the solemnities required by the law of Scotland in the conveyance of heritage.

“ But that does not decide the case, for there remains the inquiry how far the clause of revocation in the English will truly applies to the trust-conveyance in the deed 1835.

“ When the words of this revocation are considered strictly and technically, they do not, according to the principles of our law, include former conveyances of heritage ; for, with us, there is no conveyance of heritage by will or testamentary deed, but only by conveyance ostensibly *inter vivos*, and rendered testamentary in its operation, only by the fact of being retained in the custody of the disponent, and the clause dispensing with the delivery. The object, however, of subjecting real property in Scotland to the operation of a latter will, is accomplished by a circuitous course, invented by the ingenuity of conveyancers, and perhaps favoured by the Court, from the natural inclination to support the intentions of a party in the disposal of his property. The heritages are disposed to trustees as *inter vivos*, with a declaration of the purposes to which they are to be applied, and a power to declare any other purposes by will ; to which declaration the trustees are bound to give effect.

“ It appears that the cases of *Brack v. Hogg*, and *Fordyce v. Cockburn*, and indeed the whole course of prior decisions on this branch of our law, warrant the following inferences. *First*, That a trust-deed validly conveying heritages in Scotland to trustees, for purposes declared or to be declared, does enable the disponent to affect the subjects conveyed by a will, and even by an English will, which takes effect as a declaration of purposes binding on the trustees. *Secondly*, That it is not necessary, in order to produce that effect, that the will should bear any express reference to the trust-deed, or the powers therein contained. That was the state of the fact in *Willock v. Auchterlony*, and many of the other cases.

“ *Thirdly*, That no inference of any intention to recall the trust-conveyance can be drawn from the circumstance of the will bearing to be a new and direct disposal of the property formerly conveyed in trust. That occurred in many of the

cases above alluded to. There must be, in order to destroy the trust-deed, a clear revocation of that deed.

"*Fourthly*, as ruled in the case of *Fordyce v. Cockburn*, a revocation of 'all former wills and testamentary dispositions' in a will, does not necessarily revoke a previous trust-deed of Scottish heritage, as such deed is not held to fall under that general description.

"The only question then here is, Do the words used in the revoking clause of the will 1841 necessarily include the trust-deed 1835? And upon that question we have a decision, that of *Cockburn v. Fordyce*, directly and literally in point. It was there expressly found that these very expressions, 'wills and testamentary dispositions,' do not, in a question of revocation, include or apply to a previously executed trust-conveyance of Scottish heritable property. I am aware that a distinction has been taken between that case and the present, on the ground that here the trust-disposition contained not only the conveyance of the lands, but also the declaration of the purposes of the trust, which it is said was not the nature of the deed in the case of *Fordyce*. This appears to me to be a very shadowy distinction. If a trust-conveyance with purposes declared is held a testamentary disposition, it would be difficult to place in a different category, a trust-disposition executed for no other purpose but that of enabling the disponent to test.

"But on looking at the case of *Fordyce*, it will be found that there is no ground for the distinction. There, as well as here, the purposes were declared, by reference to the existing English will, previously executed by the truster. The trust was granted for the 'uses, ends, and purposes, declared and appointed by me in the foresaid will of 3d August 1813,' and such other purposes as he might appoint by any subsequent will or testamentary deed. The trust-disposition then was, by the force of the reference to the existing will contained in it, a disposition for purposes, as much as if these purposes had been inserted in the disposition itself. The judgment, then, must have rested not on the distinction alluded to, but on the distinction between that part of the deed which was truly dispositive of Scottish heritable property to the trustees, and that which was declaratory of purposes; the former of which did not fall under the

LEITH
C.
LEITH.
1848.

LEITH
v.
LEITH.
1848.

description of a testamentary disposition, though the latter might.

“In a question of this kind, which is truly a question of intention, I cannot hesitate between the two readings. There can be no doubt of the testator’s intentions. He intended that the distribution should take place in terms of the will 1841. That, indeed, is not always conclusive. From the operation of our technical rules of conveyancing we are frequently compelled to disregard that consideration. If a party possessed of Scottish heritage, gives and bequeaths it, instead of disposing it, we have no alternative, and cannot remedy his blunder. But that is always a matter of regret ; and where a court is not precluded by such technicalities, it is bound to give due effect to the testator’s intentions, and to construe his settlements in accordance with those intentions, as far as the expressions employed by him will bear.

“If the will 1841, then, had expressly revoked the trust-deed described by date and contents, I could not have easily escaped the conclusion, however much I might have lamented, that the party had from ignorance frustrated his own intentions, by revoking the very deed which might have supported them. But when there is no such clause—when, above all, the words employed may be read in a different way, and are the very words which were read by the Court in a different way, and found by a judgment of the Court, not to include a trust-deed like that under consideration—I really do think it would be dealing a very hard measure to this gentleman to find, that by using these very words so dealt with by the Court, he had unwittingly defeated the unquestionable object of his settlements.

“On these grounds, I am of opinion that the conveyance in trust to the trustees in the deed 1835 was not revoked by the clause of the will 1841 ; and that the pursuers are, therefore, entitled to obtain decret of constitution in terms of their libel.”

Lord Jeffrey.

LORD JEFFREY observed,—“The judgment which is now to be pronounced is contrary to that which I should have adopted, though I confess I feel no regret that it should be so ; and after the singularly full discussion which this case has received, both in the Opinions of the consulted Judges, and in these now

delivered by your Lordships, I have really very little to say, farther than that I fully concur in the views of my Lord Justice-Clerk and Lord Cockburn ; and especially in those so well developed in the first part of the Opinion of Lord Ivory, while I am compelled to dissent from the conclusion to which he comes in the second part ; and I have, in truth, nothing very material to add.

LEITH
c.
LEITH.
1848.

“ Upon the first and most general question, as to a revocation of an undelivered disposition being a deed affecting Scots heritage, and as such, or as a deed of importance generally, requiring to be authenticated according to the law of Scotland, I need only say that I am perfectly satisfied with the exposition of the principles and authorities contained in the Opinions already referred to ; and indeed have long been of opinion, that after the cases in which deeds, which do in truth, directly and exclusively, regulate the transmission of such heritage, have been found effectual without such authentication, wherever the power of making them had been reserved, or held to be reserved, in an original conveyance regularly tested, it would be altogether inconsistent, and, as it appears to me, even extravagant, to require the observance of these formalities, to give validity to a mere clause of revocation.

“ There is a long series of cases of the first description, from that of Pringle in 1767 in the House of Lords, to that of Cameron and Mackie in 1831, in all which an English testament, or other writ not tested according to the law of Scotland, was found sufficient to fix the descent of landed property in this country—on the sole consideration that such property had been previously conveyed to trustees for purposes to be afterwards expressed, and that the subsequent instruments might be regarded in the light of mere instructions to the original trustees. In some of these cases no particular purposes were expressed in the original deed ; which was what has been called a mere skeleton trust, the whole practical effect and operation of which was left to depend on some future instruments : But in many of them there were certain original purposes and destinations declared ; and the reserved power was merely that of appointing additional or other purposes ; and in the whole of them, in so far as I remember, the trustees

LEITH
v.
LEITH.
1848.

were infeft and invested with the fiduciary fee before any question arose.

“Now, is it possible to doubt that in all these cases, where a writing not tested according to the Scots forms was yet found sufficient either to fill up an entirely blank destination, or to recall and displace original destinations of land estate in this country, there was far more reason to hold that these should be considered as writings affecting and disposing of Scots heritage, than in the case of a mere revocation of an undelivered disposition, still in the custody and at the uncontrolled disposal of the granter? In many of the former cases, where the trustees were infeft, and original beneficiaries had been named, these beneficiaries obviously had an existing and vested interest in the lands—which was evacuated, and a new interest created by the improbative deed, recalling the old and declaring the new destination; and in all of them the actual succession and ultimate right to the land was solely and exclusively created by that improbative instrument, which was truly the only operative and regulating title under which the property was taken; while the simple revocation of an undelivered disposition obviously divests no right, and enters into no progress of titles; but merely intercepts a latent purpose of altering or innovating upon the old existing destination, and leaves it to take effect as if no such purpose had ever been entertained.

“An undelivered disposition, in short, while it remains in that state, clearly vests no right in any one, and in no way affects the descent or transmission of the land. It is, in point of fact, but a private note or declaration of a floating or present intention in the mind of the granter, and may accordingly be at once annihilated and destroyed by any declaration of a change in that intention—proved in any way in which acts of personal volition may be competently proved. It is therefore in no sense a deed affecting heritage; but, on the contrary, an intimation rather, that heritage is *not* to be affected. It divests no right, and creates no right; but leaves the whole titles and destinations of the property as they stood previously on the record—totally unaltered and unaffected by any deed, prior or posterior—contemplated or actually executed—of the proprietor.

LEITH
F.
LEITH.
1848.

“The other view relates entirely to the evidence of its having been the actual intention of Sir George Leith to revoke his settlement of 1835, by the deed executed by him in December 1841. And here, too, I find most of what had occurred to me, as bearing on that question, so fully anticipated in the reasons and conclusions set forth in the Opinions of Lord Justice-Clerk and Lord Cockburn, that I scarcely think it necessary to detain your Lordships by any farther observations. The grounds of my opinion are shortly—*First*, That the revocation is here expressed in the most direct and comprehensive terms, being anxiously declared to extend to ‘all former and other wills, codicils, and testamentary dispositions, by me at any time heretofore made;’ which words I must consider of the same force and effect as if it had been added,—‘and in particular, the trust-settlement executed by me at Edinburgh on the 11th December 1835, and the supplementary holograph deed executed at Helensburgh on the 30th of July 1841.’

“The *Second* ground of my opinion on this branch of the case is, that this revocation occurs in the preamble or recital of a deed which was evidently viewed and intended as an universal, independent, and complete settlement of the granter’s whole property and estate, bearing no reference to, and contemplating and requiring no support from, any previous disposition; and, *Third*, that, though obviously made *intuitu* of that new and complete settlement, and proceeding on the granter’s full reliance upon its validity and effect, it was still, and for this very reason, intended to be a total revocation of all former settlements, and anxiously set forth as such, for the very purpose of thus obtaining a clear field, or *tabula rasa*, for the exclusive occupation of that sole and final expression of will and purpose—and for excluding all risk of confusion or interference with any previous more imperfect and now repudiated arrangements.

“When I have said this, I need scarcely add that I cannot recognise any legal relevancy in a topic pressed upon us with great urgency, and unquestionably with great moral force and effect, in the course of this argument—I refer to the suggestion that, by sustaining the revocation, and yet denying effect to the whole other provisions of the settlement in which it occurs,

LEITH
v.
LEITH.
1848.

we manifestly disappoint and go against the anxious wish and undoubted intention of the testator, and pronounce, in fact, for an intestate succession, which it is manifest that he was most anxious to exclude. Now, I fully admit, both that this is a true and just account of the character and effect of the judgment which I think we should pronounce, and that it is very much to be regretted that we should be compelled to pronounce it.

“But the answer is, that the rules of law are inflexible, and cannot be set aside by considerations of hardship or particular equity; and that it is in truth entirely owing to the rashness of the testator himself, or his legal advisers, that he has been placed within the danger of their operation. Having too implicit a reliance on the validity of his new settlement, he thought fit to clear the way for it by an absolute revocation of all former dispositions; and must abide the penalty of this overweening confidence, either in his own conviction, or in the skill or judgment of those by whom he was directed.”

The result of the Opinions of the Court was as follows:—On the Question of Competency. For—LORD JUSTICE-CLERK HOPE, LORDS FULLERTON, JEFFREY, COCKBURN, WOOD, and ROBERTSON. Against—LORD PRESIDENT BOYLE, LORDS MACKENZIE, MEDWYN, MONCREIFF, CUNNINGHAME, and MURRAY. Majority For—One. On the Question of Intention. For—LORD JUSTICE-CLERK HOPE, LORDS JEFFREY, COCKBURN, WOOD, and ROBERTSON. Against—LORD PRESIDENT BOYLE, LORDS MACKENZIE, MEDWYN, FULLERTON, MONCREIFF, CUNNINGHAME, MURRAY, and IVORY. Majority Against—Three.

JUDGMENT.
June 6, 1848.

The following Judgment was accordingly pronounced by the Court:—“In conformity with the Opinions of the majority of the whole Court, repel the defence stated to the original action of constitution, and find that the trust-settlement of Sir George Leith, dated 11th December 1835, was not effectually revoked by the deed dated 2d December 1841; and that the defender, his heir-at-law, is bound to make up titles to the heritable subjects referred to in the original summons of constitution, and to convey the same to the trustees named by Sir George Leith in the said trust-settlement, and decern; reserving all questions

as to the rights and interests of parties under the several testamentary writings executed by Sir George Leith ; and with these findings, remit the cause to the Lord Ordinary to do therein as to his Lordship shall seem just."

LEITH
v.
LEITH.
1848.

1. Notwithstanding the great difference of opinion which existed in the Court in the case of *LEITH v. LEITH*, it may now be considered a settled point, until a contrary judgment is pronounced by the House of Lords, that a settlement of Scots heritage may be revoked by a foreign deed. Nor does it seem necessary to limit the proposition to the case of an undelivered settlement merely. If it be competent for the Court to look at a foreign deed as revoking a settlement undelivered, it must be on the ground that the foreign deed is legal evidence of the act of revocation. A disponent, therefore, in a delivered settlement could scarcely be heard to question the exercise of a reserved power of revocation by such a deed, his own right being qualified by that reservation.

2. The first case in which the competency of revoking a settlement by a foreign deed was raised, was that of *SIMPSON v. BARCLAY*, in 1752. The judgment in that case consisted of two parts. The first related to an act of revocation, and the second to an act of conveyance. The Court were unanimous upon the first point, and held the revocation effectual. They seem also to have been unanimous that the deed in ques-

tion, being a testamentary deed, could not operate as a conveyance of heritage ; but the opinion of the majority prevailed, to the effect, that as the will and meaning of the testator were manifestly expressed by the deed in question, the heir-at-law was bound to make up titles and denude in favour of the party favoured by the deed. This part of the judgment has always been considered erroneous, and was strongly animadverted upon by the Court in the case of *MONTGOMERY v. FOULIS*, in 1795, which was, in fact, the same case as the former. In that case, a creditor of the representative of the pursuer in the former action, attempted to reduce the judgment pronounced in 1752, on the ground that the deed was not executed according to the solemnities of the law of Scotland ; that therefore it could not operate as a conveyance of heritage in Scotland ; and that as this plea had not been urged in the former case, the pursuer was entitled to insist in it now. It was true that no such ground had been urged in the former action : and in so far as related to the second part of the judgment, no such ground was necessary to be urged, for if the deed had been holograph, or tested according to the law of Scotland, it would still have been

ineffectual to convey heritage, as it was destitute of the proper dispositive words essential to the constitution of a valid conveyance of heritage. It was farther alleged, that the deed had been considered by the Court, in the former action, as having been holograph of the testator. Of the truth of this allegation there is no evidence. The original deeds were not produced in Court, but the copies founded on show distinctly that they had been executed according to the solemnities required by the law of England, and therefore the presumption is against them having been considered as holograph. It is also worthy of note, that the pursuer in the case of *MONTGOMERY v. FOULIS* founded upon the deed as a deed of revocation, and argued that although ineffectual as a conveyance, it was good as a revocation.

3. The second case in which the point occurred was that of *DUNDAS v. DUNDAS*. The ground upon which the House of Lords proceeded in reversing the judgment of the Court below did not touch the principle of that judgment. That judgment, therefore, remains evidence of the law of Scotland upon that point; and, considering the names of the Judges by whom the judgment was pronounced, more competent evidence could not possibly be required. The following is a Note of the Opinions delivered at both the first and second advising of the cause, taken by Mr., after Chief Baron Dundas, who was one of the counsel for the defender:—"February 25, 1783.

LORD BRAXFIELD.—Two questions arise from the marriage articles. First founded on want of Sir Laurence's powers by the marriage articles. I do not see how Sir Thomas can challenge the entail on want of Sir Laurence's powers, because he represents his father universally, and therefore cannot set aside on want of powers. But declaratory conclusions different. *First*, Virtual revocation will not do, unless the deed be valid. But this is a null deed, and implied revocation will not do. Clear that this deed is not a proper settlement of Scots estates. But then it may be a declaration of will, not a conveyance of property. Suppose that he had given a power of attorney to go to Stirlingshire and take out tailzie, and burn it. If this, therefore, a probative deed by law of England, this is a sufficient revocation of his whole tailzie."

4. **LORD PRESIDENT DUNDAS.**—"Opinion with Braxfield on the first point, that no ground of reduction. Not even reducible by heir of marriage. Earl of Selkirk case similar. Deed of revocation totally ineffectual as to effect of conveyance. Had it been in favour of a stranger, there would have been no effect given to it. But here it is to the heir-at-law. The words apply to the whole estates and all former wills. Must be the tailzie—the only former settlement. Tailzie not favourable, and not entitled to favourable interpretation." **LORD JUSTICE-CLERK MILLER.**—"Revocation sufficiently broad and extensive, and goes

also on ample and reserved powers in entail." LORD MONBODDO.—"Same opinion." LORD ESK-GROVE.—"Sir Thomas barred from reducing entail as heir of marriage by universally representing his father. But, at all events, no ground of reduction. Revocation perfectly ample and effectual to revoke. Applicable to all settlements or wills of English, Irish, Scots, or West India estates. Any declaration of will sufficient to revoke." LORD ELLIOTT.—"Revocation applies to every settlement whatever of these estates." LORD GARDENSTON.—"Agree as to both points." —*MS. Notes, Arniston Session Papers.*

5. The following is the Note relative to the second advising:—"*March 11, 1785.*—LORD BRAXFIELD.—'Adhere to former opinion.' LORD JUSTICE-CLERK MILLER.—'Reason to think that Sir Laurence did not mean to revoke as to lands under marriage articles, because they are expressly excepted in the will. As to point of *ultra vires*, wishes to hear parties farther.' LORD BRAXFIELD.—'As to the conclusions of reduction, clear, they are not well founded. But clear on the declaratory conclusion. Founds on the last clause of the will. Without it the entail would not have been revoked. Revocation is either express or implied. If second deed effectual, the first must fly off. Undoubtedly, if both could stand at once, the first will not be revoked. But that not the case here. Clear that this could not have the effect of settling the Scots estate by devise or be-

quest. But it is effectual to carry off limitations. Besides, exception of marriage articles shows that, as it is not repeated in the revoking clause, this last was to be perfectly ample and broad. This is a *quæstio voluntatis*, and Sir Laurence's intention was to make a Catholic settlement of his whole estate in fee-simple. He also would have included the Stirling estates, but that was *ultra vires*, and therefore he naturally threw in that exception alone, which shows that the limitations imposed by the entail or any other settlement were to fly off.' LORD GARDENSTON.—'A deed effectual by law of England equally effectual in Scotland, in so far as not contradictory to any express part of our law. The reason of Sir Laurence's exception clearly was, that he knew he had no power to alter the marriage settlements. The clause quite general, and no ground to presume that he meant anything else than an ample revocation, as far as he had powers.'"

6. LORD HENDERLAND.—"Last will conceived in terms ample and broad enough to convey, by the law of England, but not by the law of Scotland. And if ineffectual, cannot hold it as anything, or as an implied revocation. As to clause of revocation, cannot give to the word 'will' the explanation of meaning a Scots entail." LORD PRESIDENT DUNDAS.—"Thought we ought to have petitioned sooner, in order to being heard. But not for delay, on account of loss to Sir Thomas Dundas in making up titles. Petitioner *sibi imputet* therefore. As to merits. Had devise been

to stranger, and revocation included therein, would have had great doubts. 'My whole estate'—What words could be more express in a *quæstio voluntatis*? The exception of the marriage articles confirms me in that opinion. He revokes the whole, not a part of the entail. He excepts only the marriage articles. Sir Laurence could not mean to revoke the entail as to the major part of his estate, and keep up the fetters as to the small pittance, i.e., the £4500 a year. I must take the word 'will' in the sense Sir Laurence clearly took it—a general one. Adhere."—*MS. Notes, Arnishton Session Papers.*

7. The third case in which the question occurred was that of *LANG v. WHYTLAW*. In consequence of LORD PRESIDENT BLAIR having stated that the Judgment went upon specialties, this case has hitherto been unreported. His Lordship, however, must have referred to that part of the judgment merely which sustained the claim of the widow under the first deed. There was no specialty in regard to the general question, Whether it was competent to revoke the first deed by the second, the latter having been executed according to the solemnities of the law of England, within whose jurisdiction the granter was at the date of its execution? The other question, Whether, notwithstanding the revocation, the widow's rights under the first deed might be sustained, on the ground that the object of the revocation was clearly to augment, and not to diminish her interest, was decided,

it is thought, contrary to law, for that was to sustain the revocation in part, and to reject it in part. Against this inconsistency LORD ARMADALE delivered his opinion. There existed good grounds, therefore, for regarding this part of the judgment as proceeding on a specialty, but none as to the other. On that point, it was a most solemn judgment of the Court. No case could receive more deliberate consideration. The interlocutor of LORD ARMADALE, Ordinary, was reclaimed against in an elaborate petition, to which answers were prepared by Mr., afterwards Lord Jeffrey. A Hearing was then appointed; and after the Hearing had taken place, Memorials were ordered. The judgment of the Court was then reclaimed against on the part of the special legatees and the residuary disponees under the first deed; and upon advising their petition with answers for the heirs-at-law, the Court Adhered.

8. Lord President Blair himself would not have failed to regard the decision as a binding authority on the general point, in so far as related to a deed of revocation probative according to the law of the place where it was executed; but he refused to recognise it as an authority on the point that a deed of revocation executed in Scotland, without regard to the solemnities of the law of Scotland, was sufficient. This is shown by the Note preserved by Baron Hume of what took place at the last advising. The argument submitted on the part of the heir-at-

law went farther than the case required, for it was in a great measure as applicable to the case of a deed of revocation, not according to the solemnities of the law of the place where it was executed, as to one that was. The case, however, required no such stretch of the argument, for the deed in question was valid according to the law of England. It was therefore unnecessary for the Court to pronounce any opinion upon a point which was not before them. LORD SUCCOTH, accordingly, in reference to this point, has written on his Session Papers as follows :—" There is no occasion to decide the question, Whether a deed of revocation executed in Scotland must be formal according to the solemnities of our law, for the revocation in question, executed in Jamaica, is regular, according to the law of the country where it was executed. This takes off much of the difficulty. As to the only general point which it is necessary to determine, I remain of former opinion, upon the ground of the decision passed in Sir Thomas Dundas' case."—*MS. Notes, Lord Succoth's Session Papers.*

9. Considering the strong opinion held by LORD PRESIDENT BLAIR, on the general point involved in the case of *LANG v. WHYTLOW*, it may not be uninteresting to know the opinion of his predecessor, LORD PRESIDENT CAMPBELL, who had retired from the Bench before that case came to be decided, but who was still on the Bench when the petition against LORD ARMADALE's inter-

locutor was presented. That petition is dated November 21, 1807, and on it LORD PRESIDENT CAMPBELL has written—" Revocation, Deathbed, and English Deed. Interlocutor probably right. But answers should be taken. If interlocutor right, petitioner will still by the English deed get the personal estate. But the Græmes will be excluded altogether.—P.16. Case of Sir Thomas Dundas. Judgment of House of Lords misunderstood. The ground of the judgment in the Court of Session was, that a clause of revocation in a latter will or testamentary settlement might be good, although such will could not be sustained as a settlement. Lord Thurlow did not combat that proposition, but was of opinion that in fact the revocation contained in Sir Laurence's last will, did not reach or apply to the special settlement in form of entail of certain estates therein mentioned. His words, as taken down at the moment by one of the counsel who argued the cause for Sir Thomas, were these : ' Question is, Whether,' &c. The ground, therefore, of the Court of Session was left untouched."—*MS. Notes, Sir Ilay Campbell's Session Papers.*

10. In the case of *HENDERSON v. WILSON and MELVILLES*, LORD PRESIDENT CAMPBELL also indicated his opinion on the point under consideration. On the Session Papers in that case he has written,—" The argument with regard to the solemnities of a revocation, viz., that it is enough if it be executed according to the *lex*

loci, seems to have a good deal of foundation, as a revocation is truly no more than an exercise of will which requires no specific form, but may be done by any deed which is of a probative nature. The House of Peers seems to have gone upon this idea in the case of declaring uses and purposes in the case of *Willoch v. Auchterlony*. But the difficulty in this argument is, that the procuratory in 1763 did not contain any express revocation of the preceding one, but only an implied revocation by settling of new in a different manner."—*MS. Notes, Sir Ilay Campbell's Session Papers*.

11. The opinion of LORD MEADOWBANK was also to the same effect. On the Session Papers in the case of *HENDERSON v. WILSON*, he has written,—“Any decided act of the will, authentically expressed, by destroying or cancelling a deed, or by giving an order for that purpose, is sufficient to revoke; and I think the solemnities of the *lex loci* are the most proper for ascertaining all such acts of the will, which are not settlements of property, but merely undoing what is by law in the absolute power of the granter to undo at any time. One learned Judge said, that Sir Laurence might have granted a commission in the English form, appointing a person to take his Scots entail, and destroy it after his death. I can see no valid objection to such a commission in point of solemnities.”—*MS. Notes, Lord Meadowbank's Session Papers*.

12. After the judgment of the

Court in the case of *WILLOCH v. AUCHTERLONY*, in 1769, affirmed in the House of Lords in 1772, it was impossible to maintain that every deed affecting heritage must be executed according to the solemnities required by the law of Scotland. A revocation of a prior settlement does not affect heritage in so great a degree as a deed of instructions to trustees directing them to convey the lands held by them in trust to such party as the truster may choose to name. Such a deed operates both as a deed of revocation and as a deed of conveyance. For by means of it the prior investiture is destroyed, and the estate is conveyed away to a stranger. A deed of revocation, on the other hand, generally restores the prior investiture, and, at all events, it revives a deed of conveyance formerly executed. In the case of *WILLOCH v. AUCHTERLONY*, the Court were a good deal divided. After a period of sixty years, the opinion of the minority had effect given to it by LORD ELDIN, as Ordinary in the case of *KER v. KER'S TRUSTEES*, in 1829, but the Court altered his Lordship's interlocutor. A stand had been previously made for the same view, by LORD GLENLEE, in the case of *BRACK v. JOHNSTON*, in 1827, but the judgment of the Court overruling the opinion of his Lordship, was affirmed in the House of Lords in 1831. The last case in which the question was again raised, was that of *CAMERON v. DICK'S TRUSTEES*, in 1831, when the judgment of the Court was again affirmed; so that

the principle established by the case of *WILLOCH v. AUCHTERLONY*, is placed beyond all challenge for the future.

13. The minority of the Court, in the case of *LEITH v. LEITH*, seem to have had the same reluctance to allow deeds to affect heritage which were not probative by the law of Scotland, as LORD EL-DIN and LORD GLENLEE had in the previous cases of *KER v. KER'S TRUSTEES*, and *BRACK v. JOHNSTON*. The Judges, however, who decided the case of *WILLOCH v. AUCHTERLONY*, had no difficulty in applying a similar principle to the case of a revocation executed by a foreign deed. Independently of the case of *SIMPSON v. BARCLAY*, in 1752, the competency of such a mode of revocation stands supported by the names of LORD

PRESIDENT DUNDAS, LORD PRESIDENT MILLER, and LORD PRESIDENT CAMPBELL, by those also of LORD JUSTICE-CLERK BRAXFIELD and LORD JUSTICE-CLERK ESKGROVE, and by those also of LORD MEADOWBANK and LORD ARMADALE. The only great name, and indeed the only name which can be cited in support of the opposite view, is that of LORD PRESIDENT BLAIR. From the review now made, therefore, it appears that the Opinion of the Court in the case of *LEITH*, although carried by the narrowest majority, is the last of a series of judgments, without any decision to the contrary, affirming the proposition that a settlement of Scots heritage may be revoked by a foreign deed, if probative by the law of the place where it is executed.

INDEX OF CASES.

	PAGE		PAGE
Aboyne <i>v.</i> Farquharson, . . .	45	Bogle <i>v.</i> Hamilton, . . .	22
Aglianby <i>v.</i> Ross, . . .	361	Book <i>v.</i> Earl of Dalkeith, . . .	105
Aikenhead <i>v.</i> Justice, . . .	227	Boyd <i>v.</i> Govan, . . .	112
Ainslie <i>v.</i> Watson, . . .	196	Boyd's Trustees <i>v.</i> Paul, . . .	510
Aitken <i>v.</i> Aitken, . . .	182	Brack <i>v.</i> Johnston, . . .	412
Alexander <i>v.</i> Rowan, . . .	653	Braco <i>v.</i> Keith, . . .	388
Anderson <i>v.</i> Anderson, . . .	19	Breadalbane's Trustees <i>v.</i> Horne, . . .	55
Anderson <i>v.</i> Fleming, . . .	650	Breadalbane (Marquis of) <i>v.</i> Sinclair, . . .	70
Anderson <i>v.</i> Nasmyth, . . .	152	Brodie's Executors <i>v.</i> Dunbar, . . .	563
Anderson <i>v.</i> Norton, . . .	31	Brown and Collinson <i>v.</i> Dun- lop's Creditors, . . .	290
Anderson <i>v.</i> Struan, . . .	318	Brown <i>v.</i> Gordon, . . .	301
Angus <i>v.</i> Angus, . . .	529, 553	Brown <i>v.</i> Nicholas, . . .	256
Anstruther <i>v.</i> Renton, . . .	21	Brough <i>v.</i> Glover, . . .	98
Arbuthnot <i>v.</i> Kennedy, . . .	566	Bruce <i>v.</i> Spence, . . .	206
Athole (Duke of) <i>v.</i> Robertson, . . .	208	Buchan <i>v.</i> Cockburn, . . .	33
Auchinbreck <i>v.</i> Binnings, . . .	248	Buchanan <i>v.</i> Snodgrass, . . .	592
Auchterlony <i>v.</i> Willoch, . . .	401	Burrell <i>v.</i> Burrell, . . .	535
B		Burton <i>v.</i> Macwhinnie, . . .	301
Baker <i>v.</i> Gedde, . . .	190, 200	C	
Balfour <i>v.</i> Johnston, . . .	221	Cairnfield <i>v.</i> Gordon, . . .	172
Balfour <i>v.</i> Wilkieson, . . .	300	Cairnie <i>v.</i> Welsh, . . .	102
Ballagan Annualrenters <i>v.</i> Stir- ling, . . .	226	Caitcheon <i>v.</i> Ramsay, . . .	221
Ballantyne <i>v.</i> Muir, . . .	228	Cameron <i>v.</i> Dick's Trustees, . . .	406
Barclay <i>v.</i> Creditors of Crimon- mogat, . . .	222	Cameron's Trustees <i>v.</i> Hutchinson, . . .	129
Barclay and Gemmil <i>v.</i> Simpson, . . .	1	Campbell <i>v.</i> Drummond, . . .	270
Barclay <i>v.</i> Wallace, . . .	228	Campbell <i>v.</i> Edderline, . . .	458
Batley <i>v.</i> Small, . . .	650	Campbell <i>v.</i> Gordon, . . .	263
Beveridge <i>v.</i> Coutts, . . .	360	Campbell <i>v.</i> MacCallum, . . .	391
Binning <i>v.</i> Auchinbreck, . . .	248	Campbell <i>v.</i> McMillan, . . .	466
Birkmire <i>v.</i> Finlay, . . .	645	Campbell <i>v.</i> Macvicar, . . .	121
Bisset <i>v.</i> Walker, . . .	332	Campbell <i>v.</i> Scotland, . . .	155
Blaw, Petitioner, . . .	292	Campbell <i>v.</i> Spiers, . . .	464
Bogle <i>v.</i> Cochrane, . . .	148	Carmichael <i>v.</i> Carmichael, . . .	390

	PAGE		PAGE
Carmichael <i>v.</i> Landale, . . .	174	Douglas <i>v.</i> Duke of Hamilton, . .	10
Carse, Laird of, <i>v.</i> His Brother, .	313	Douglas (Duchess of) <i>v.</i> Scott, .	233
Cathcart <i>v.</i> Cathcart, . . .	547	Drummond <i>v.</i> Campbell, . . .	270
Cathcart <i>v.</i> Kynnymound, . . .	563	Drummond <i>v.</i> Mackenzie, . . .	327
Chalmers <i>v.</i> Cunningham, . . .	253	Drysdale <i>v.</i> Grindlay, . . .	140
Chalmers <i>v.</i> King, . . .	18	Drysdale <i>v.</i> Paton, . . .	194
Chalmers <i>v.</i> Mireton, . . .	344	Dunbar <i>v.</i> The Executors of	
Cochrane <i>v.</i> Bogle, . . .	148	Brodie,	563
Cochrane <i>v.</i> Dunlop, . . .	362	Dundas <i>v.</i> Dundas, . . .	667
Cochrane <i>v.</i> Ramsay, . . .	395	Dundas <i>v.</i> Lewis, . . .	415
Cockburn <i>v.</i> Buchan, . . .	33	Dundas <i>v.</i> Rollo, . . .	335
Cockburn <i>v.</i> Fordyce, . . .	412	Dundonald <i>v.</i> Crawford, . . .	333
Cockburn's Creditors <i>v.</i> Langton, .	266	Dunlop <i>v.</i> Cochrane, . . .	362
Cockburn's Creditors <i>v.</i> Langton, .	281	Dunlop's Creditors <i>v.</i> Brown and	
Collinson and Brown <i>v.</i> Dun-		Collinson,	290
lop's Creditors,	290	Durie <i>v.</i> Corser,	314
Corser <i>v.</i> Durie,	314	Durie <i>v.</i> Coutts,	524
Coustoun and Guill <i>v.</i> Macaulay, .	312		
Coutts <i>v.</i> Beveridge,	360	E	
Coutts <i>v.</i> Crawford,	617	Easter Fearn Creditors, . . .	300
Coutts <i>v.</i> Durie,	524	Easter Ogle Creditors <i>v.</i> Lyon, .	292
Cave's Creditors <i>v.</i> Murray, . . .	553	Edderline <i>v.</i> Campbell, . . .	458
Cowan <i>v.</i> Turnbull,	455	Erskine <i>v.</i> Kennedy,	360
Craigie <i>v.</i> Ker,	353	Erskine <i>v.</i> Ogilvy,	476
Crawford <i>v.</i> Coutts,	617		
Crawford <i>v.</i> Dundonald,	333	F	
Crimonmogat's Creditors <i>v.</i> Bar-		Farquharson <i>v.</i> Aboyna, . . .	45
clay,	222	Finlay <i>v.</i> Birkmire,	645
Cunningham <i>v.</i> Chalmers,	253	Finnie <i>v.</i> The Lords of the Treas-	
Cunningham <i>v.</i> Gainer,	615	ury,	548
Cunningham <i>v.</i> Glen,	395	Fleming <i>v.</i> Anderson,	650
Cunningham <i>v.</i> Semple,	110	Fleming <i>v.</i> Murray,	592
Cunningham <i>v.</i> Whitefoord, . . .	643	Forbes <i>v.</i> Gordon,	359
Cutler <i>v.</i> M'Lellan,	204	Forbes <i>v.</i> Innes,	40
		Fordyce <i>v.</i> Cockburn,	412
D		Forrester <i>v.</i> Hutchison,	48
Dalkeith (Earl of) <i>v.</i> Book, . . .	105	Foulis <i>v.</i> Montgomery,	7
Dalrymple <i>v.</i> Ranken,	454	Fraser <i>v.</i> Rose,	449
Dalziel <i>v.</i> Henderson and Dal-			
ziel,	324	G	
Dempster <i>v.</i> Willison,	429	Gainer <i>v.</i> Cunningham,	615
Dick's Trustees <i>v.</i> Cameron, . . .	406	Gemmil and Barclay <i>v.</i> Simpson, .	1
Dick <i>v.</i> Gillies,	549	Gardner <i>v.</i> Trinity House of Leith, .	32
Dickson <i>v.</i> Dooly,	315	Gedd <i>v.</i> Baker,	190, 200
Don <i>v.</i> Graham,	50	Giles <i>v.</i> Lindsay,	479
Donaldson <i>v.</i> Grant,	464	Gillies <i>v.</i> Dick,	549
Dooly <i>v.</i> Dickson,	315	Gillespie <i>v.</i> Robertson,	331

	PAGE		PAGE
Glen v. Cunningham, . . .	395	Hutchison v. Stewart, . . .	40
Glendinning v. Earl of Nithsdale, 350		I	
Glover v. Brough, . . .	98	Inglis v. Harper, . . .	417
Goodlet v. Livingstone, . . .	171	Innes v. Forbes, . . .	40
Gordon v. Brown, . . .	301	Irving v. Irving, . . .	666
Gordon v. Cairnfield, . . .	172	J	
Gordon v. Campbell, . . .	263	Johnston v. Balfour, . . .	221
Gordon v. Forbes, . . .	359	Johnston v. Brack, . . .	412
Gordon's Trustees v. Harper, 499		Johnston v. Johnston, . . .	243
Gordon v. Ogilvie, . . .	366	Justice v. Aikenhead, . . .	227
Govan v. Boyd, . . .	112	K	
Graham v. Don, . . .	50	Keith v. Braco, . . .	388
Graham v. Graham, . . .	46, 389	Kennedy v. Arbuthnot, . . .	566
Graham v. Sorlie's Trustees, . . .	41	Kennedy v. Erskine, . . .	360
Grant v. Donaldson, . . .	464	Ker v. Craigie, . . .	353
Grierson v. Ramsay, . . .	516	Ker v. Ker, . . .	666
Grindlay v. Drysdale, . . .	140	Ker v. Ker's Trustees, . . .	404, 439
Guill and Coustoun v. Macaulay, 312		Kers v. Wauchope, . . .	432
H		Kibble v. Ross, . . .	19
Hamilton v. Bogle, . . .	22	King v. Chalmers, . . .	18
Hamilton (Duke of) v. Douglas, 10		Kirk-Session of Ceres v. Shanks, 18, 42	
Hamilton v. Lennox, . . .	95	Kynnynmound v. Cathcart, 563	
Hamilton v. McCulloch, . . .	243	L	
Hamilton v. Macdowal, . . .	21	Lagg v. His Tenants, . . .	31
Hamilton v. Montgomery, . . .	92	Landale v. Carmichael, . . .	174
Hamilton v. Nisbet, . . .	244	Lang v. Whytlaw, . . .	650
Harper v. Gordon's Trustees, 499		Lang v. Whytlaw, . . .	674
Harper v. Inglis, . . .	417	Langton v. Cockburn's Creditors, 266	
Hawkins v. Hawkins, . . .	555	Langton v. Cockburn's Creditors, 281	
Hay (of Linplum) v. Hay, . . .	49	Leith v. Leith, . . .	615, 691
Henderson and Dalziel v. Dalziel, 324		Lennox v. Hamilton, . . .	95
Henderson v. Macadam, . . .	227	Louis v. Dundas, . . .	415
Henderson v. Selkirk, . . .	21	Lindsay v. Giles, . . .	479
Henderson v. Wilson and Mel-		Lindsay v. Stewart, . . .	164
ville, . . .	594	Lindsay v. Stewart, . . .	304
Hepburn v. Scott, . . .	348	Lithgow v. Whitehaugh, . . .	276
Hill v. Montrose, . . .	32	Livingstone v. Goodlet, . . .	171
Hill v. Ormiston, . . .	172	Lyon v. Creditors of Easter Ogle, 292	
Horne v. Breadalbane's Trustees, 55		M	
Horns v. Stevenson, . . .	388	Macadam v. Henderson, . . .	227
Houstoun v. Nicholson, . . .	455	Macaulay v. Coustoun and Guill, 312	
Houstoun v. Robertson, . . .	386	MacCallum v. Campbell, . . .	391
Hutchinson v. Cameron's Trus-			
tees, . . .	129		
Hutchison v. Forrester, . . .	48		

	PAGE		PAGE
MacCulloch v. Hamilton, . .	243	Nicolson's Creditors v. Miln, . .	259
Macdonald v. MacGregor, . .	127	Nisbet v. Hamilton,	244
Macdowal v. Hamilton, . . .	21	Nisbet v. Ross,	244
Macdowall and Selkirk v. Russell, .	505	Nisbett's Trustees v. Ruther-	
M'Ewan v. Thomson,	564	ford,	373, 397
Macfarlane v. Middlemore, . .	347	Nisbet v. Stirling,	287
MacGregor v. Macdonald, . .	127	Nithsdale (Earl of) v. Glen-	
Mackenzie v. Drummond, . .	327	dinning,	350
Mackenzie v. Mackenzie, . .	32	Norton v. Anderson,	31
Mackenzie v. Monro,	149		
Mackenzie v. Ross and Ogilvie, .	133	O	
Maclellan v. Cutler,	204	Officers of State v. Urquhart, .	340
Maclellan v. Macree,	181	Ogilvie v. Gordon,	366
MacMillan v. Campbell, . . .	466	Ogilvie v. Mercer,	13
Macneil's Creditors v. Saddler, .	296	Ogilvie and Ross v. Mackenzie, .	133
Macpherson v. Macpherson, .	387, 455	Ogilvy v. Erskine,	476
Macree v. Maclellan,	181	Ormiston v. Hill,	172
Macvicar v. Campbell,	121		
Macwhinnie v. Burton,	301	P	
Maule v. Maule,	398	Park v. Robertson,	32
Maxwell v. Mounsey,	40	Paton v. Drysdale,	194
Melville v. Preston,	478	Patrick v. Nichol,	550
Melvilles and Wilson v. Henderson, .	594	Paul v. Boyd's Trustees, . .	510
Melvin v. Nicol,	432	Paul v. Reid,	182
Menzies v. Menzies,	320	Preston v. Melville,	478
Mercer v. Ogilvie,	13	Porterfield v. Stewart, . . .	569
Middlemore v. Macfarlane, . .	347		
Miln v. Creditors of Nicolson, .	259	Q	
Mireton v. Chalmers,	344	Queensberry Executors v. Craw-	
Moir v. Mudie,	646	furd Tait,	294
Monro v. Mackenzie,	149		
Montgomery v. Foulis,	7	R	
Montgomery v. Hamilton, . . .	92	Ramsay v. Caitcheon,	221
Montrose v. Hill,	32	Ramsay v. Cochrane,	395
Mounsey v. Maxwell,	40	Ramsay v. Grierson,	516
Mudie v. Moir,	646	Ramsay v. White,	551
Muir v. Ballantyne,	228	Ranken v. Dalrymple,	454
Murray v. Cave's Creditors, . .	553	Ranken v. Reid,	430
Murray v. Fleming,	592	Reid v. Paul,	182
		Reid v. Ranken,	430
N		Renton v. Anstruther,	21
Nasmyth v. Anderson,	152	Robertson v. Duke of Athole, .	208
Nichol v. Patrick,	550	Robertson v. Gillespie, . . .	331
Nicholas v. Brown,	256	Robertson v. Houston,	386
Nicholson v. Houston,	455	Robertson v. Park,	32
Nicol v. Melvin,	432	Rollo v. Dundas,	335

735

	PAGE
Stirling v. Annualrenters of Bal- lagan,	226
Stirling v. Nisbet,	287
Strachan v. Creditors of Strachan,	293
Struan v. Anderson,	318
Sutherland v. Sinclair,	45
T	
Tait v. Queensberry Executors,	294
Thomson v. M'Ewan,	564
Thomson v. Young,	180
Treasury, Lords of, v. Finnie,	548
Trinity House of Leith v. Gardner,	32
Turnbull v. Cowan,	455
U	
Urquhart v. Officers of State,	340
W	
Walker v. Bisset,	332
Wallace v. Barclay,	228
Watson v. Ainslie,	196
Wauchope v. Kerr,	432
Wauchope v. Roxburghe,	659
Welsh v. Cairnie,	102
White v. Ramsay,	551
Whiteford v. Cunningham,	643
Whitehaugh v. Lithgow,	276
Whytlaw v. Lang,	650
Whytlaw v. Lang,	674
Wilkieson v. Balfour,	306
Willison v. Dempster,	429
Willoch v. Auchterlony,	401
Wilson v. Smart,	519
Wilson and Melvilles v. Hen- derson,	594
Wood v. Scott,	129
Y	
Young v. Thomson,	180

INDEX OF MATTERS.

ADJUDICATION.

1. An adjudication, until it becomes irredeemable, is merely a *pignus prætorium*, or judicial security, and not a sale under reversion, 133.
2. The true nature of an adjudger's right described, 147.
3. An adjudication, although followed by charter and sasine, if not followed by possession, is lost by the negative prescription, 152.
4. The expiry of the legal does not *ipso facto* vest a right of property in the adjudger, 155.
5. A decree of the expiry of the legal when obtained in absence, is liable to be opened up on certain grounds, 174.
6. Extrinsic objections to an adjudication are lost by the negative prescription, 182.
7. Intrinsic objections to an adjudication, may be pleaded at any time, notwithstanding the lapse of prescription, 194.
8. Possession upon a charter of adjudication for 40 years, from the expiry of the legal, vests an absolute right of property in the adjudger, without a declarator of the expiry of the legal, 200.
9. A conveyance, after the expiry of the legal, to an onerous singular successor, by the creditor obtaining the first effectual adjudication, will not prejudice the right of adjudgers prior to or within year and day of that adjudication, 222.
10. An adjudication without infestment does not exclude a subsequent infestment, proceeding upon a prior voluntary right, 226.
11. An adjudication not followed by an infestment, or at least by a charge to the superior *debito tempore*, does not exclude an infestment proceeding upon a subsequent voluntary right, 228.
12. By the Act 10 & 11 Victoria, cap. 48, an adjudger, in obtaining a decree of adjudication, may also obtain warrant from the court for infesting him in the lands adjudged, 248.
13. The infestment of a prior adjudger is not communicated to a posterior adjudger, although within year and day, so as to prejudice an intervening infestment on a voluntary right, and in ranking with the posterior adjudger, the prior adjudger is entitled to receive the same sum as that for which he would have ranked, if the intervening infestment had not existed, 248.
14. The inhibition of a creditor not

adjudging, does not affect a posterior creditor adjudging, if the debt of one of the adjudgers, contracted prior to the inhibition, exceeds the value of the lands adjudged, 259.

15. Where the *pluris petitio* is not very great or culpable, an adjudication will be restricted to a security, but otherwise it will be reduced *in toto* in a question with other creditors, 296.
16. By virtue of the Act 10 & 11 Victoriae, cap. 48, an adjudication against an unentered heir proceeds without a special or general special charge, as the circumstances of the case might have required, 311.

ADJUDICATION CONTRA HÆREDITATEM JACENTEM.

1. An adjudication may be redeemed by an heir served, who has previously renounced, 304.
2. In virtue of the Act 10 & 11 Victoriae, cap. 48, an adjudication against an unentered heir, is not preceded by letters of special charge or general special charge, as the circumstances of the case would formerly have required, 311.
3. Although an heir renounces, his creditor is entitled to lead an adjudication *contra hæreditatem jacentem* of his ancestor, 312.
4. An adjudication *contra hæreditatem jacentem* carries the rents accruing, since the death of the party last infest, 314.

ADJUDICATION IN IMPLEMENT.

1. Where two parties adjudge in implement, and neither of them is infest, the party first charging

the superior will be preferred in a competition, 119.

2. An adjudication in implement is not subject to be ranked *pari passu* with other adjudications of any kind, 121.
3. In an adjudication in implement there is no legal reversion, 126.
4. An adjudication in implement cannot be stayed by the common agent in a ranking and sale, 129.
5. A general conveyance of lands is sufficient to found an action in implement of the conveyance, 98.
6. An adjudication in implement of a trust-disposition granted by an apparent heir, is incompetent as a mode of entry to an ancestor's estate, 362.

ADJUDICATION IN SECURITY.

1. An adjudication in security is not a proper title to land, for it cannot by any lapse of time or act of the creditor, become an absolute title, but remains ever a security merely, 291.
2. Land may be adjudged in security of a future or contingent debt, where the debtor is *vergens ad inopiam*, 287.
3. An adjudication led in payment of a future or contingent debt, cannot be converted into an adjudication in security, 294.
4. Where the *pluris petitio* is not very great or culpable, an adjudication will be restricted to a security, but otherwise it will be reduced *in toto* in a question with other creditors, 296.

APPROBATE AND REPROBATE.

1. The law of approve and reprobate is not applicable to the case of an heir of investiture,

reducing a deed executed on deathbed, and at the same time founding upon it, in so far as it revokes a prior settlement in favour of a stranger, 637.

ARRESTMENT.

1. A *jus crediti* against a trust-estate is attachable by arrestment, where the obligation of the trustee is to account, and not to denude of a specific heritable subject, 516.

ASSIGNATION.

1. An assignation of writs and evidents in a deed of conveyance, is construed with reference to the extent of the right conveyed in the dispositive clause, 50.
2. The import of the clause of ASSIGNATION OF WRITS AND EVIDENTS, as declared by the Act 10 & 11 Victoria, cap. 48, 103.
3. The import of the clause of ASSIGNATION OF THE RENTS as declared by the Act 10 & 11 Victoria, cap. 48, 103.
4. A *jus crediti* to a special heritable subject held by trustees, is transmissible by assignation, 499.

CONSENT.

1. A conveyance granted by a party without having right to the subject conveyed, but with consent of the true owner, is effectual, 33.
2. The position of a party consenter differs from that of a party disposer, in this, that the consent of the former has reference only to the rights vested in him at the time of consenting, but does not extend to other rights which he may subsequently acquire, 39.

3. The rule of law *jus superveniens auctori accrescit successori*, does not apply to a consenter to a deed of conveyance, unless he has expressly bound himself in war-randice, 40.

CONVEYANCE.

1. Land cannot be conveyed by testament or by any deed not expressing a present act of alienation, 1.
2. No expression of intention to convey land, however clear, will afford ground of action against the heir of the testator to denude, 1.
3. In a deed of conveyance of land, the word "dispose" is a *vox signata*, the use of which is essential to the validity of a conveyance, 21.
4. A precept of *clare constat*, or any other precept of sasine, is sufficient as a deed of conveyance, 17.
5. A procuratory of resignation is of the nature of a disposition, and operates as a direct conveyance, 21.
6. A conveyance granted by a party without having right to the subject conveyed, but with consent of the true owner, is effectual, 33.
7. The position of a party consenter differs from that of a party disposer, in this, that the consent of the former has reference only to the rights vested in him at the time of consenting, but does not extend to other rights which he may subsequently acquire, 33.
8. The dispositive clause is the regulating clause of a deed of conveyance, 42.
9. Where the precept of sasine or

the procuratory of resignation is disconform with the dispositive clause, the former must regulate, 45.

10. Where something manifestly appears omitted in the dispositive clause, and which is contained in one of the other clauses in the deed, the omission will be supplied from these clauses, 45.
11. A conveyance of land will not *per se* carry collateral rights not essential to the right of property in the land, 50.
12. An assignation of writs and evidents in a deed of conveyance will be construed with reference to the extent of the right conveyed in the dispositive clause, 50.
13. A general conveyance of lands is sufficient to found an action against the granter's heir to denude, or of an action in implement of the conveyance, 98.
14. Land cannot be conveyed by a deed not executed according to the solemnities prescribed by the law of Scotland, 105.
15. A title to land is acquired, passed, and lost, only according to the *lex rei sitæ*, 109.
16. An express obligation to convey land, executed *secundum legem loci contractus*, will be enforced in Scotland, 118.
17. A gratuitous conveyance of land invalid by the law of Scotland, either in regard to the proper solemnities not having been used, or in regard to the proper dispositive words having been omitted, will have no effect given to it, either as a deed of conveyance itself, or as importing an obligation to convey, and will afford no ground of action

against the granter and his heirs, 118.

18. An onerous informal conveyance of land, although not effectual as a conveyance itself, implies an obligation to convey, and affords ground of action against the granter and his heirs to implement the implied obligation, 118.

DEATHBED.

1. A conveyance of land to trustees subject to uses, to be afterward declared, is not sufficient to displace the heir of investiture, although the trust-deed is executed in *liege poustie*, and a subsequent declaration of uses will not operate to the prejudice of the heir of investiture, if it is executed on deathbed, 432.
2. An express revocation of a prior settlement in favour of a stranger, contained in a subsequent conveyance to another stranger executed on deathbed, restores the right of the heir of investiture, 617.
3. When the deathbed deed contains an express revocation of a prior deed, the right of the heir revives, although both deeds are in favour of the same donee, 646.
4. An implied revocation of a prior settlement in favour of a stranger does not restore the right of the heir of the investiture, and entitle him to reduce the subsequent deed as being executed on deathbed, 653.

DECLARATOR.

1. The action of declarator was not unknown in the Roman law, but was used in regard to servitudes,

and was either positive or negative according as the object was to affirm or deny the existence of a servitude, 329.

2. The action declaring a right of servitude was termed in the Roman law the *actio confessoria*, and the action seeking to have land declared free of a servitude was called, the *actio negatoria*, 329.

DECLARATORY ADJUDICATION.

1. Land conveyed to trustees without mention of heirs, or where, being mentioned, the heirs refuse to make up a title and denude, will be effectually conveyed to the beneficiary under the trust by declaratory adjudication, 320.
2. A declaratory adjudication is a real action, in which the object is not to have a decree against the defender as for a debt, but a judgment against the land or other property, 329.
3. A decree under a declaratory adjudication, like that under an adjudication in implement, is not subject to the *pari passu* preference, 329.

DECREE OF SALE.

1. A decree of sale is an adjudication proceeding at the instance of a creditor holding a real security over the estate, where the debtor is insolvent, or without insolvency, at the instance of an apparent heir of the debtor as trustee for the creditors, and for his own eventual interest, 344.
2. A decree of sale when properly completed as a feudal title, is the best and most eligible title that a purchaser can receive, 345.
3. A decree of sale will not operate

against a preferable right of property in a party not called in the process of sale, 335.

4. In a sale by an apparent heir, the right of the purchaser is not affected by the appearance of a nearer heir, and recourse can only be had by such heir upon the receivers of the price, 347.

DOMINIUM DIRECTUM.

1. The *dominium directum* may be conveyed *per se* without a conveyance of the lands themselves, 22.
2. The *dominium directum* and the *dominium utile* are distinct and separate rights, 26.

FOREIGN.

1. Land cannot be conveyed by a foreign deed, 105.
2. An obligation to convey land constituted by a foreign deed, will afford ground of action against the granter and his heirs to implement the obligation, 110.
3. Where lands are conveyed by a trust-disposition, subject to uses to be afterwards declared, the uses may be declared by a foreign deed, 401.
4. A settlement of heritage may be revoked by a foreign deed, 667.

HEIR.

1. An adjudication may be redeemed by an heir served who has previously renounced, 304.
2. General and special charge to enter heir described, 306.
3. Letters of general charge, or special charge, or general special charge, abolished by the Act 10 and 11 Victoria, cap. 48, 311.
4. Although an heir renounces, his creditor is entitled to lead an

adjudication *contra hereditatem jacentem* of his ancestor, 312.

APPARENT HEIR.

1. An apparent heir, in virtue of his apparency, may, without any service, pursue a reduction of the service and infestment of another party, 397.
2. Where an apparent heir, in virtue of an adjudication proceeding on a trust-bond granted by himself, challenges a real right to the lands which had belonged to his predecessor, and fails, a judgment of absolvitor is *res judicata* against a second apparent heir making up a second title in the same character, and challenging the right upon the same ground, 366.

HEIR OF ENTAIL.

1. A deed obtained against an heir of entail in possession is *res judicata* against all substitute heirs of entail, though not parties to the process, 398.

HERITABLE AND MOVEABLE.

1. Where land is conveyed to trustees by a *mortis causa* settlement with positive instructions to sell, or where it is clear from the deed that the truster intended that the land should be sold, the right of the beneficiary entitled to the residue of the trust-estate is moveable; but where the land is conveyed with merely a discretionary power to sell, the legal character of the residue depends on the circumstance of the power to sell having been exercised or not, 524.
2. Where land is conveyed to trustees by a debtor for behoof of his

creditors generally, the accession of his personal creditors will not alter the character of their debts from moveable to heritable, 553.

IMPLIED.

1. An implied revocation of a prior settlement is not presumed, where the subsequent deed is ineffectual to carry the lands conveyed by the prior deed, and the prior deed is held to subsist, unaffected by the subsequent one, 594.
2. An implied revocation of a prior settlement in favour of a stranger does not restore the right of the heir of the investiture, and entitle him to reduce the subsequent deed as being executed on deathbed, 653.

INHIBITION.

1. Inhibition is a negative or prohibitory diligence, and gives the creditor a right to reduce all posterior voluntary deeds granted by the debtor, but has no positive effect in transferring the property or possession of the debtor's estate to himself, 261.
2. Where a deed is actually voided *ex capite inhibitionis*, the reduction has no effect, except in favour of the inhibitor himself, and the deed continues in full force with regard to every other creditor, 261.
3. Debts though contracted after inhibition, cannot be voided *ex capite inhibitionis*, if the inhibitor could have drawn nothing from the debtor's estate, even though these posterior debts had not been contracted, 261.
4. The inhibition of a creditor not adjudging, does not affect a posterior creditor adjudging, if the

debt of one of the adjudgers, contracted prior to the inhibition, exceeds the value of the lands adjudged, 259.

5. Illustrations of the principle, that an inhibitor is entitled to receive that share only of the debtor's estate which he would have received if the right struck at by the inhibition had not existed, 262.
6. Where the inhibition used by one adjudger is prior to an infestment on a voluntary security, but posterior to the debts of the other adjudgers, it affects the voluntary security only, and the holder of that security is not entitled to recur on the simple adjudgers for the sum claimed from him by the inhibiting adjudger, 266.
7. Where the inhibition used by a creditor adjudging, is prior to several preferable infestments proceeding on voluntary rights, it affects the holders of these infestments in the postponed order of their ranking, 276.

JUS SUPERVENIENS.

1. The rule of law, *jus superveniens auctori accrescit successori*, does not apply to a consenter to a deed of conveyance, unless he has expressly bound himself in warrandice, 40.

LEGAL.

1. The expiry of the legal does not, *ipso facto*, vest a right of property in the adjudger, 155.
2. A decree of expiry of the legal, when obtained in absence, is liable to be opened up on certain grounds, 174.
3. Possession upon a charter of adjudication and sasine for forty

years from the expiry of the legal, vests an absolute right of property in the adjudger, without a declarator of expiry of the legal, 200.

4. A conveyance, after the expiry of the legal, to an onerous singular successor, by the creditor obtaining the first effectual adjudication, will not prejudice the right of adjudgers prior to or within year and day of that adjudication, 222.

NOMINATION OF HEIRS.

1. A nomination of heirs is valid, if supported by a relative deed of conveyance, 578.
2. A deed of nomination does not require any conveyance of the lands. The clause of conveyance in the deed reserving the right to nominate heirs is the foundation of the right of the heirs nominated, 579.
3. A nomination of heirs may be executed by a party authorized by the testator, in a deed of conveyance, to do so, 592.

OBLIGATION TO CONVEY.

1. An obligation to convey land situated in Scotland executed in a foreign country according to the law of that country, although not valid by the law of Scotland, affords ground of action against the granter and his heirs to implement the obligation, 110.

PRECEPT OF SASINE.

1. Form of precept of sasine made competent by the Act 8 and 9 Victoria, cap. 35, 104.

PRESCRIPTION.

1. An adjudication, although followed

- by charter and sasine, if not accompanied by possession, is lost by the negative prescription, 152.
2. Extrinsic objections are lost by the negative prescription, 182.
 3. Intrinsic objections to an adjudication may be pleaded at any time, notwithstanding the lapse of prescription, 194.
 4. A right of property in land is not subject to the negative prescription, 191.

PROPRIIS MANIBUS.

1. An infestment *propriis manibus*, without any antecedent disposition, is sufficient for the purpose of transmitting land, provided the instrument of sasine is signed by the granter as well as the notary, 18.
2. An instrument of sasine, *propriis manibus*, does not require to be attested in the manner of a regular probative deed, 19.
3. A sasine, *propriis manibus*, is both a deed of conveyance and a sasine, 19.

RANKING OF ADJUDICATIONS.

1. A conveyance, after the expiry of the legal, to an onerous singular successor, by the creditor obtaining the first effectual adjudication, will not prejudice the right of adjudgers prior to or within year and day of that adjudication, 222.
2. The infestment of a prior adjudger is not communicated to a posterior adjudger, although within year and day, so as to prejudice an intervening infestment or a voluntary right, and in ranking with the posterior adjudger, the prior adjudger is entitled to receive the same sum as that for

which he would have ranked if the intervening infestment had not existed, 248.

3. The inhibition of a creditor not adjudging does not affect a posterior adjudger, if the debt of one of the adjudgers contracted prior to the inhibition exceeds the value of the lands adjudged, 259.
4. Illustrations of the principle that the holder of an excluding right is entitled to receive that share only of a common debtor's estate which he would have received if the excluding right had never existed, 262.
5. Where the inhibition used by one adjudger is prior to an infestment on a voluntary security, but posterior to the debts of the other adjudgers, it affects the voluntary security only, and the holder of that security is not entitled to recur on the simple adjudgers for the sum claimed from him by the inhibiting adjudger, 266.
6. The rule of ranking adjudications, 272.
7. When the inhibition used by a creditor adjudging is prior to several preferable infestments proceeding on voluntary rights, it affects the holders of these infestments in the postponed order of their ranking, 276.

RES JUDICATA.

1. Where an apparent heir, in virtue of an adjudication proceeding on a trust-bond granted by himself, challenges a real right to the lands which had belonged to his predecessor, and fails, a judgment of absolutor is *res judicata* against a second apparent heir, making up a similar title in the

same character, and challenging the right upon the same ground, 366.

2. A decree obtained against an heir of entail in possession, is *res judicata* against all substitute heirs of entail, though not parties to the process, 398.

REVOCATION.

1. An implied revocation of a prior settlement is not presumed, where the subsequent deed is ineffectual to carry the lands conveyed by the prior deed, and the prior deed is held to subsist, unaffected by the subsequent one, 594.
2. An express revocation of a prior settlement in favour of a stranger, contained in a subsequent conveyance to another stranger executed on deathbed, restores the right of the heir of investiture, 617.
3. When a deathbed deed contains an express revocation of a prior settlement, the right of the heir revives, although both deeds are in favour of the same disponee, 646.
4. An implied revocation of a prior settlement in favour of a stranger, does not restore the right of the heir of the investiture, and entitle him to reduce the subsequent deed as being executed on deathbed, 653.
5. A settlement of heritage may be revoked by a deed valid by the law of the place where it is executed, although not valid by the law of Scotland, 667.

SERVICE.

1. A general service is a sufficient title for reducing a right on

which infestment has followed, 388.

2. A general service by an heir-apparent cannot be used as a title on which to challenge another's infestment, without the pursuer rendering himself liable to all the objections that would be competent against him if entered, 394.
3. Where the right sought to be reduced is completed by infestment, a special service is incompetent, 395.
4. Where a general service to an ancestor has been expedited by one party, another general service to the same person by another party is incompetent, 395.
5. An apparent heir in virtue of his apparency, may without any service pursue a reduction of the service and infestment of another party, 397.
6. A *jus crediti* to a special heritable subject held by trustees, vests in the beneficiary without a service, 499.

STATUTE.

1. Import of the clause of OBLIGATION TO INFEST, as declared by the Act 10 and 11 Victoria, cap. 48, 102.
2. Import of the clause of RESIGNATION, as declared by the Act 10 and 11 Victoria, cap. 48, 102.
3. Import of the clause of ASSIGNATIONS OF WRITS OF EVIDENTS, as declared by the Act 10 and 11 Victoria, cap. 48, 103.
4. Import of the clause of ASSIGNATION OF THE RENTS, as declared by the Act 10 and 11 Victoria, cap. 48, 103.
5. Import of the clause of WARRANT

- DICE, as declared by the Act 10 and 11 Victoriae, cap. 48, 103.
6. Import of the clause of OBLIGATION TO FREE AND RELIEVE FROM FEU-DUTIES, &c., as declared by the Act 10 and 11 Victoriae, cap. 48, 103.
 7. By the Act 10 and 11 Victoriae, cap. 48, conveyances of land held under real burdens, &c., do not require a full insertion of them, provided they are specially referred to as set forth at full length either in the original recorded Instrument of Sasine, or *Resignation ad remanentiam*, or in any subsequent recorded instrument of sasine, forming part of the progress of title-deeds of the lands conveyed, 103.
 8. By the Act 10 and 11 Victoriae, cap. 48, conveyances of land held under a deed of entail, are not required to contain a full insertion of the conditions of the entail, provided they are specially referred to as set forth at full length in the recorded deed of entail, or in any recorded Instrument of Sasine, forming part of the progress of title-deeds of the lands held under the entail, 104.
 9. By the Entail Act 11 and 12 Victoriae, cap. 36, a deed of entail does not require to contain any irritant and resolute clause, provided it contains an express clause authorizing it to be recorded in the Register of Tailzies, and the clause of registration must be engrossed as part of the entail in the Register of Tailzies, and must also be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts, and instruments of sasine following on the entail, 104.
 10. Form of Precept of Sasine made competent by the Act 8 and 9 Victoriae, cap. 35, 104.
 11. By the Bankrupt Statute, 2 and 3 Victoriae, cap. 41, in all questions upon the Act, all dispositions, heritable bonds, or other heritable rights, whereupon infestment may follow, are reckoned to be of the date of the registration taken thereon, 131.
 12. By the Bankrupt Statute, 2 and 3 Victoriae, cap. 41, the whole heritable estates of the bankrupt in Scotland are declared to be by virtue of the Act, and warrant of confirmation in favour of the trustee, transferred to and vested in him for behoof of the creditors absolutely and irredeemably as at the date of the sequestration, 132.
 13. By the Act 10 and 11 Victoriae, cap. 48, an adjudger in obtaining a decree of adjudication, may also obtain warrant from the Court for infesting him in the lands adjudged, 248.
- SUPERIORITY.
1. The superiority of lands may be conveyed *per se* without a conveyance of the lands themselves, 22.
 2. The *dominium directum* and the *dominium utile* are distinct and separate rights, 26.
- TESTAMENT.
1. Land cannot be conveyed by Testament, 1.
 2. Directions to trustees regarding the disposal of land conveyed to them, may be given in a testament, provided the testament

is not liable to be reduced on the head of deathbed, 401.

TRUST-ADJUDICATION.

1. An apparent heir may complete a title to his ancestor's estate, by means of an adjudication proceeding on a trust-bond granted by himself, and conveyed to him by the trustee, 348.
2. An adjudication upon a trust-bond conveyed by the trustee to the heir granting the bond, although not feudalized, will operate to the effect of altering the destination in the last investiture, 348.
3. Act of Sederunt passed by the Court 1662, regarding adjudications proceeding on trust-bonds granted by apparent heirs, 351.
4. The mode of entering to an ancestor's estate, by means of an adjudication on a trust-bond, recognised in the Act 1695, cap. 24, 351.
5. An apparent heir may make up a title to his ancestor's estate by means of a trust-adjudication, although his right to be heir is disputed, and although the estate sought to be adjudged is held under the fetters of an entail, 353.
6. An apparent heir may also make up a title to his ancestor's estate by means of a trust-adjudication, in order to reduce a conveyance by his ancestor, although the disponee under the deed be infest, 360.
7. An adjudication in implement of a trust-disposition granted by an apparent heir, is incompe-

tent as a mode of entry to his ancestor's estate, 362.

8. Where an apparent heir, in virtue of an adjudication proceeding upon a trust-bond granted by himself, challenges a real right to the lands which had belonged to his predecessor, and fails, a judgment of absolvitor in the defender's favour, is *res judicata* against a second apparent heir making up a similar title in the same character, and challenging the right upon the same ground, 366.

TRUST-DISPOSITION.

1. Where lands are conveyed by a trust-disposition valid by the law of Scotland, subject to uses to be afterwards declared, the trust uses may be declared by any writing probative by the law of the place where it is executed, 401.
2. Where a trustor declares the purposes of a trust in a writing apart from the trust-deed, the writing must be in a probative form, unless acknowledged and referred to by the trustor in that or some other probative deed, 415.
3. A conveyance of land to trustees subject to uses to be afterwards declared, is not sufficient to displace the heir of investiture, although the trust-deed is executed in *liege pousie*, and a subsequent declaration of uses will not operate to the prejudice of the heir of investiture, if it is executed on deathbed, 432.
4. Where land is conveyed to trustees for behoof of a party, the infestment of the trustees does not exclude the widow of the

- party for whose behoof they held the lands from her right of terce, 449.
5. Where any delay occurs in fulfilling the purposes of a trust, the beneficiary must be dealt with as if the trust had been duly implemented, 454.
6. Where lands are held by trustees for behoof of a party, the beneficiary under the trust is entitled to exercise the same powers as he might have exercised if the lands had been actually conveyed to him by the trustees, 454.
7. A conveyance of land to trustees with power of sale, subject to a reconveyance of the reversion to the truster, does not absolutely divest the truster, but operates merely as a burden on his radical right of property, and that right is liable to be adjudged by his creditors, 458.
8. An Entail executed by a party who has granted a trust-conveyance for behoof of creditors, is valid in virtue of the radical right of property remaining in the truster, 466.
9. Where land is conveyed by a trust-disposition under the burden of an entail to be executed by the truster, but the effect of which is suspended during the subsistence of the trust, the trustees may make up a title to the lands, although the entail has been previously feudalized in the person of the institute, 478.
10. Heritable securities granted by a party who has previously granted a conveyance of the lands *ex facie* absolute, but truly in trust for his own behoof, and completed in the person of the donee, will exclude the personal creditors of the truster, 479.
11. A *jus crediti* to a special heritable subject held by trustees, vests in the beneficiary without a service, and is transmissible by assignation, 499.
12. A *jus crediti* against a trust-estate is attachable by arrestment, where the obligation of the trustee is to account, and not to denude of a specific heritable subject, 516.
13. Where land is conveyed to trustees with positive instructions to sell, or where it is clear from the deed that the truster intended that the land should be sold, the right of the beneficiary entitled to the residue of the trust-estate is moveable, but where it is conveyed with merely a discretionary power to sell, the legal character of the residue depends on the circumstance of the power to sell having been exercised or not, 524.
14. Where land is conveyed to trustees by a debtor for behoof of his creditors generally, the accession of his personal creditors will not alter the character of their debts from moveable to heritable, 553.

WARRANTICE.

1. Unless a consentor to a deed of conveyance expressly binds himself in warrantice, the rule of law, *jus superveniens auctori accrescit successori* does not apply to him, 40.
2. An obligation of warrantice against augmentation of stipend, is not carried by a general assignation of writs and evi-

dents, but requires to be expressly assigned, 55.

3. The import of the clause of warrandice in a deed of conveyance, as declared by the Act 10 and 11 Victoriae, cap. 48, 103.

WRIT.

1. Where a trust declares the purposes of a trust in a writing apart from the trust-deed, the writing must be in a probative form, unless acknowledged by

the trustor in that or some other probative deed, 415.

WRITS AND EVIDENTS.

1. An assignation of writs and evidents in a deed of conveyance, is construed with reference to the extent of the right conveyed in the dispositive clause, 50.
2. The import of the clause of assignation of writs and evidents, as declared by the Act 10 and 11 Victoriae, cap. 48, 103.

M

1881



